87-851

Supreme Court, U.S.
FILED
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JOSEPH F. SPANIOL, JR.
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No. 87-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

ROGER CLARK, CARL BUSHEY,
JOHNNY RUSSELL, TERRY FISHER,
AND BART VIGLIELMO,

Petitioners,

v.

MOMENCE PACKING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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November 19, 1987

90 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

QUESTIONS PRESENTED

1. May a defendant in a state court action for retaliatory discharge remove the case to federal court whenever the defendant asserts that the claim is preempted by a collective bargaining agreement and section 301 of the Labor Management Relations Act?

2. Does 28 U.S.C. § 1445(c), which bars removal of an action arising under state workers compensation laws, preclude removal of a claim for retaliatory discharge filed under state law which forbids discharge for pursuing rights under that state's workers compensation laws?

3. Does section 301 of the Labor-Management Relations Act preempt states from protecting employees against being discharged for seeking benefits under the state's workers compensation law, simply

(ii)

because the employee is a member of a union that has negotiated a grievance and arbitration procedure for resolving disputes with the employer about the collective bargaining agreement?

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PETITION FOR A WRIT OF CERTIORARI
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Petitioners, Roger Clark, Carl Bushey, Johnny Russell, Terry Fisher, and Bart Viglielmo, petition the Court to issue a writ of certiorari to the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The decision of the district court is reported at 637 F. Supp. 16 (C.D. Ill.

1985), and is set forth at pages 5a to 17a of the appendix to this petition. The decision of the court of appeals, affirming the district court on the basis of Lingle v. Norge, 823 F. 2d 1031 (7th Cir. 1987) (en banc), cert. granted, No. 87-259 (Oct. 13, 1987) is designated as not for publication and is set forth at App. 1a to 4a. The decision in Lingle v. Norge, is set forth at App. 18a to 64a.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 1987, and is set forth at App. 3a to 4a. The Court has jurisdiction pursuant to 28 U.S.C. § 1254 (1).

STATUTES INVOLVED

28 U.S.C. §1331 provides,

The district courts shall have original jurisdiction of all civil

actions arising under the Constitution, laws, or treaties of the United States. 28 U.S.C. § 1441 provides, in pertinent part,

(a) Except as otherwise provided by an Act of Congress, any civil action brought in a state court of which the district courts of the United States have original jurisdiction, may be removed. . . . to the district court of the United States for th[at] district . . .

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right under the Constitution, treaties, or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants

is a citizen of the State in which the action is brought.

28 U.S.C. §1445(c), provides,

A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.

Section 301(a) of the Labor-Management Relations Act, 29 U.S.C. § 185 (a), provides,

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Ill. Rev. Stat. 1975, ch. 48, par. 138.4(h), provides,

> It shall be lawful for any employer, insurance company or service or adjustment company to interfere with, restrain or coerce an employee in any manner whatsoever in the exercise of the rights and remedies granted to him or her by th[e Workers Compensation] Act or to discriminate, attempt to discriminate, or threaten to discriminate against an employee in any way because of his or her exercise of the rights or remedies granted to him or her by this Act.
>
> It shall be unlawful for any employer, individually or through any insurance company or service or adjustment company, to discharge or to threaten to discharge, or to refuse to rehire or recall to active service in a suitable capacity an employee because of

the exercise of his or her rights or remedies granted to him or her by this Act.

STATEMENT

A. Facts

On January 12, 1983, Roger Clark sustained injuries in the course of his employment with the respondent, Momence Packing Company in Kankakee County, Illinois. On March 9, 1984, he filed an application for adjustment of claim pursuant to the Illinois Workers Compensation Act. Subsequently, the respondent fired him for filing for workers compensation.

On December 28, 1987, Carl Bushey sustained injuries in the course of his employment with the respondent, Momence Packing Company in Kankakee County, Illinois. On July 18, 1984, he filed an application for adjustment of claim

pursuant to the Illinois Workers Compensation Act. Subsequently, the respondent fired him for filing for workers compensation.

On August 29, 1983, Johnny Russell sustained injuries in the course of his employment with the respondent, Momence Packing Company in Kankakee County, Illinois. On November 2, 1983, he filed an application for adjustment of claim pursuant to the Illinois Workers Compensation Act. Subsequently, the respondent fired him for filing for workers compensation.

On July 29, 1983, Terry Fischer sustained injuries in the course of his employment with the respondent, Momence Packing Company in Kankakee County, Illinois. On May 21, 1984, he filed an application for adjustment of claim pursuant to the Illinois Workers

Compensation Act. Subsequently, the respondent fired him for filing for workers compensation.

On May 6, 1983, Bart Viglielmo sustained injuries in the course of his employment with the respondent, Momence Packing Company in Kankakee County, Illinois. On June 23, 1984, he filed an application for adjustment of claim pursuant to the Illinois Workers Compensation Act. Subsequently, the respondent fired him for filing for workers compensation.

At all times relevant to the facts, the petitioners were members of Local 546 of the United Food and Commercial Worker's International Union of the AFL-CIO. There was a collective bargaining agreement in effect between the respondent and the union. Section 8 of that agreement provided that "[n]o

employee shall be discharged without good and sufficient cause." That section also required arbitration of "[a]ny dispute with arises concerning the application or interpretation" of the agreement.

B. Proceeding Below.

On March 20, 1985, petitioner, Bart Viglielmo filed suit against Momence in the Circuit Court of the Twelfth Judicial Circuit, Kankakee County, Illinois. Petitioners Russell, Fischer, and Bushey filed suits in the same court on April 1, 1985. On April 8, 1985, Clark filed in the same court. Each alleged discharge for filing for workers compensation and claimed such discharges were violations of the Illinois Workers Compensation Act, Ill Rev. Stat. ch. 48, par. 138.4(h), giving rise to individual causes of action in tort in state court. Their complaints sought both compensatory and

punitive damages based exclusively on Illinois law. They made no claim based on the collective bargaining agreement.

On May 24, 1985, Momence removed all five cases to the United States District Court for the Central District of Illinois, Danville, Illinois, on the basis of original jurisdiction of 29 U.S.C. §185 and 28 U.S.C. §1331. Momence alleged that the Labor Management Relations Act, 29 U.S.C. §185 was the true basis of the complaints.

The employees moved to remand the cases to state court based on lack of federal jurisdiction. Subsequently, Momence filed a motion to dismiss based on federal pre-emption of the state law claims, failure to comply with the arbitration procedure in the collective bargaining agreement, and the statute of limitations.

The employees, however, argued that the tort of retaliatory discharge is a state cause of action independent of federal labor law and outside the scope of the collective bargaining agreement. The Illinois Supreme Court, in Midgett v. Sackett-Chicago, 105 Ill. 2d 143, 473 N.E. 2d 1280 (1984), cert. denied, _____ U.S. _____, 105 S. Ct. 3513 (1985), held that the tort of retaliatory discharge is independent of any rights and remedies available in a collective bargaining agreement. Further, employees need not comply with the contract arbitration provisions because the contract has no bearing on the state law. The employees argued that the important state policy preserved in retaliatory discharge precluded pre-emption by the Labor Management Relations Act.

The district court held that removal was proper and dismissed the complaints. Although the complaints did not state federal causes of action on their faces, the court held that the complaints presented federal questions under the artful pleading doctrine and that Section 301 pre-empted the state law claims. App. 12a.

Relying on Allis-Chalmers Corp. v. Lueck, 471 U.S. 202 (1985), the trial court held the employees' complaints were not independent torts but were "inextricably intertwined" with the terms of the collective bargaining agreement. App. 12a. Judge Baker then held that the petitioners' complaints arose under the laws of the United States as defined by 28 U.S.C. §1331 and were removable under 28 U.S.C. §1441. App. 14a.

The court then held that §301 pre-empted the petitioners' complaints. After acknowledging that the Illinois Supreme Court clearly intended to extend the tort of retaliatory discharge to unionized employees in Midgett v. Sackett-Chicago, 105 Ill. 2d 143, 473 N.E. 2d 1280 (1984), cert. denied, 106 S.Ct.278 (1985), the court held that the cause of action must be brought under §301. App. 15a. The court held that unionized employees only have a right to file for workers compensation without retaliation but that any retaliation is a grievance requiring exhaustion of contractual remedies. App. 16a.

While the petitioners' appeals were pending, the Seventh Circuit issued an en banc decision in Lingle v. Norge, 823 F. 2d 1031 (7th Cir. 1987). In Lingle, the court first held that 28 U.S.C §1445(c)

did not bar removal because retaliatory discharge is a tort, not a workers compensation claim. Id. at 1038-1039, App. 30a. Further, the meaning of the workers compensation laws,as defined by §1445 (c), is a question of federal law "regardless the label a state may give an action." Id. at 1039, App. 31a. Consequently, the court held that §1445(c) did not bar removal.

Next, the court held that the employees' claims fell under the "just cause" provision of the collective bargaining agreement. By not citing the collective bargaining agreement in their complaints, the court held that the employees were artfully pleading to avoid federal jurisdiction.

In its opinion, the court cursorily examined Caterpillar v. Williams, 107 S.

Ct. 2425 (1987). In Caterpillar, this Court held that unionized employees who had a contract separate from the collective bargaining agreement could sue under that separate contract without invoking the collective bargaining agreement. Consequently, the complaints were not removable to federal court under 28 U.S.C. §§1331 and 1441. The court failed to distinguish this contractual claim from the petitioners' tort claims.

Finally, the court acknowledged the Illinois Supreme Court's decision in Gonzalez v. Prestress Engineering Corp., 115 Ill. 2d 1, 503 N.E.2d 308 (1986), cert. denied, No. 86-1505 (1987), that retaliatory discharge claims fall outside of the scope of the collective bargaining agreement and federal law but explicitly rejected its reasoning. Lingle, supra at 1040, n.8., App. 31a.

REASONS FOR GRANTING THE WRIT

This case presents the questions of whether section 301 of the LMRA pre-empts state retaliatory discharge claims filed by unionized employees, whether these cases are removable as artfully pleaded federal claims, and whether 28 U.S.C. §1445 (c) prohibits removal of workers compensation cases.

1. This Court granted the petition for a writ of certiorari in Lingle v. Norge, No. 87-259, upon which the Seventh Circuit relied in affirming the district court's dismissal. Lingle presents the issue of whether state retaliatory discharge claims are preempted by Section 301. Because the Lingle petition states all of the arguments that petitioners would present here, we do not repeat those arguments now.

Despite the importance of this question, petitioners do not ask the Court to set it down for plenary argument unless Lingle is not fully briefed and argued.

2. Although the court below cited its own decision in Lingle, it did not examine the question of why the preemption defense is sufficient to confer jurisdiction in this case. Lingle had not presented that issue because the basis for removal therein was diversity of citizenship.

The court below disregarded the plainly contrary holding of this Court in Caterpillar v. Williams, 107 S. Ct. 2425 (1987). The Court therein concluded that a federal preemption defense does not convert a claim under state contract law into one arising under federal law. The Court held that an employer could not

remove a case based on state law contract rights to federal court but must litigate its preemption defense in state court. Id. at 2432. Similarly a case based on state tort rights should not be subject to removal by virtue of the assertion of a preemption defense. In neither situation does the existence of a preemption defense convert a state action based on a source other than a collective bargaining agreement into a "claim arising under the ... laws ... of the United States" within 28 U.S.C. §1331, which is therefore removable under 28 U.S.C. 1441.

This same issue is discussed in the certiorari petitions in Willoughby v. Central Ill. Light Co., No. 87-417, and Baldracchi v. Pratt & Whitney, No. 87-318. Despite the importance of this question, petitioners do not ask the

Court to set it down for plenary argument if the Court grants review in Willoughby and Baldracchi. If review is not granted in Willoughby and Baldracchi, however the court should grant review in this case on the jurisdictional and removal issue presented.

3. If the Court decides to give plenary consideration to the preemption/removal question, it should consider the effect of section 1445 (c) on removal of petitioners' retaliatory discharge claim because section 1445 (c) provides an alternative basis for denying federal jurisdiction in this case. Under section 1445 (c), actions "arising under the workmen's compensation laws" of a state may not be removed to federal court even if they are otherwise properly removable. The petition in Willoughby states all of the arguments petitioners

would present here. We do not repeat those arguments now. See also Baldracchi v. Pratt & Whitney, No. 87-318. While this issue may not be independently worthy of review of this Court, it should be given consideration in the interest of completeness if the preemption/removal question is given plenary consideration.

CONCLUSION

The petition for a writ of certiorari should be granted, or the petition should be granted and the decision below summarily reversed for lack of subject matter jurisdiction and remanded with instructions to remand to the state court.

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No. 87-

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1987

ROGER CLARK, CARL BUSHEY
JOHNNY RUSSELL, TERRY FISHER,
AND BART VIGLIELMO

Petitioners,

v.

MOMENCE PACKING COMPANY,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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November 19, 1987

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604
Submitted August 14, 1987*

August 27, 1987

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. HARLINGTON WOOD, JR., CIRCUIT JUDGE
Hon. DANIEL A. MANION, Circuit Judge

ROGER CLARK, et. al., Plaintiffs-Appellants,	Appeal from the United States District Court for the Central District of Illinois, Danville Division.
Nos. 85-3165 and 85-3227	
vs.	
MOMENCE PACKING COMPANY, Defendant-Appellee.	Nos. 85 C 2254, 85 C 2255, 85 C 2256, 85 C 2257 85 C 2258

ORDER

Lingle v. Norge Division of Magic Chef, Inc., No. 85-2971, slip op. (7th Cir. June 23, 1987) (en banc), authoritatively decides all the issues determinative of this appeal. The district court had

jurisdiction to remove the case from state court; the state tort claims are preempted by federal law; and the federal claims were properly dismissed for failure to exhaust remedies under the collective bargaining agreement. The judgment of the district court is

AFFIRMED.

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* After preliminary examination of the briefs, the court notified the parties that it had tentatively concluded that oral argument would not be helpful to the court in this case. The notice provided that any party might file a "Statement as to Need of Oral Argument." See Rule 34(a), Fed. R. App. P.; Circuit Rule 34 (f). The parties have filed such statements. Upon consideration of the statements, the briefs, and the record, the request for oral argument is denied and the appeal is submitted on the briefs and record.

2 JUDGMENT-WITHOUT ORAL ARGUMENT
UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois

August 27, 1987

Before

Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. HARLINGTON WOOD, JR.,CIRCUIT JUDGE
Hon.DANIEL A. MANION,Circuit Judge

ROGER CLARK, et. al.,	)	Appeal from the
	)	United States
Plaintiffs-Appellants,	)	District Court
	)	for the Central
	)	District
Nos. 85-3165 and	)	of Illinois,
85-3227	)	Danville
	)	Division.
vs.	)	
	)	Nos. 85 C 2254,
	)	85 C 2255,
MOMENCE PACKING	)	85 C 2256,
COMPANY,	)	85 C 2257
	)	85 C 2258
Defendant-Appellee.	)	

This cause came before the Court for decision on the record from the United States District Court for the Central District of Illinois, Danville Division.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the order of this Court entered this date.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

ROGER CLARK, et. al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	Consolidated
	)	Nos.
	)	85-2254,
MOMENCE PACKING	)	85-2255,
COMPANY,	)	85-2256,
	)	85-2257,
	)	85-2258
Defendant.	)	

ORDER

These cases come before the court on defendant's motions to dismiss and plaintiffs' motions to reconsider the order denying remand to state court. These cases were originally filed in state court. Each of the complaints set forth a claim for the Illinois tort of retaliatory discharge. The defendant, Momence Packing Company, removed these cases to federal court on the grounds that each presented a claim under section 301 of the Labor Management Relations Act of 1947 ("LMRA"), 29 U.S.C. § 185(a).

This court, on September 16, 1985, found that removal was proper because the complaints presented claims under the LMRA. The court reserved ruling on the motions to dismiss pending further briefing and argument which took place October 30, 1985. A threshold issue determines the fate of these five cases in federal court. This court must decide whether the Illinois tort of retaliatory discharge is preempted by federal labor law, specifically, section 301 of the LMRA, 29 U.S.C. Section 185 (a).[1]

---

[1]Section 301 of the LMRA provides: "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce...may be brought in any District Court of the United States having jurisdiction of the parites, without respect to the amount in controversy or without regard to the citizenship of the parties." 29 U.S.C. Section 185 (a).

The facts relevant to all five cases are as follows. The plaintiffs were employees of Momence Packing Company. All were or are members of the union bargaining unit represented by United Food and Commercial Workers, Local 546. All of the plaintiffs were discharged by Momence Packing Company allegedly after filing worker's compensation claims. A collective bargaining agreement which was signed by Momence Packing Company and the plaintiffs' union representatives was in effect at the time each was discharged. This collective bargaining agreement included a provision prohibiting discharge without "good and sufficient" cause. The exact language of this prohibition is: "[n]o members shall be discharged because of absence resulting from proven illness nor without good and

sufficient cause." Section 4(c). The collective bargaining agreement also requires that all disputes arising under the terms of the agreement be resolved in binding arbitration. Section 8.

A resolution of the question before the court requires a close look at the recent Supreme Court decision Allis-Chalmers Corporation v. Lueck, 53 U.S.L.W. 4463, 85 L. Ed.2d 206 (1985). In Allis-Chalmers, the Supreme Court determined that a state tort action for the bad-faith denial of an insurance claim was preempted by section 301 of the LMRA. The Wisconsin Supreme Court rejected the employer's argument and ruled that Lueck's claim was an "independent tort," not preempted by federal labor law. The United States Supreme Court reversed the state court, holding that the tort action was

preempted and dismissed for the failure to exhaust grievance procedures. The court set forth a test for determine whether a state tort action is preempted by section 301 of the LMRA:

> We do hold that when resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim . . ., or be dismissed as preempted by the federal labor contract law.

53 U.S.L.W. 4463, 4468, 85 L. Ed.2d 206, 221 (1985) (citations omitted). This language must be applied to the Illinois tort of retaliatory discharge.

The state court action of retaliatory discharge was judicially created in the Illinois Supreme Court decision, Kelsay v. Motorola, Incorporated, 74 Ill.2d 172 (1978). The court ruled that there was a remedy in

tort for employees who were discharged in retaliation for filing worker's compensation claims. Very recently, the Illinois Supreme Court extended the tort of retaliatory discharge to include claims by unionized employees. Midget v. Sackett-Chicago, Inc., 105 Ill.2d 143 (1984). The Court ruled that the tort action should be completely independent from the remedies available under the collective bargaining agreement; it rejected the argument that the tort claim is essentially a claim for breach of the collective bargaining agreement.

> We consider, however, that in order to provide a complete remedy it is necessary that the victim of a retaliatory discharge be given an action in tort, independent of any contract remedy the employee may have based on the collective bargaining agreement.

105 Ill.2d at 149. Cf. Moran J., dissenting opinion, 105 Ill.2d at 155. There is no doubt the majority of the Illinois Supreme Court intended that this remedy be available to union employees. The Illinois Supreme Court did not use the term preemption in its discussion, but its analysis clearly rejects a conclusion that the tort of retaliatory discharge is preempted by the federal labor laws. However, the United States Supreme Court in Allis-Chalmers v. Lueck, 53 U.S.L.W. 4463, declared that a similar conclusion by the Wisconsin Supreme Court was an "assumption about the scope of the contract provision which it had no authority to make under state law." The Court found instead that the Wisconsin state tort claim was "inextricably intertwined with the considerations of the terms of the labor contract," and was

therefore preempted. 53 U.S.L.W. 4463, 85 L.Ed.2d 206, 216. It is impossible to avoid a similar conclusion about the Illinois Supreme Court's statements in Midget.

The tort of retaliatory discharge requires only two allegations. Plaintiff must allege a retaliatory discharge and that the discharge violated a clear public policy. Any state court consideration of a retaliatory discharge claim involves an inquiry into the cause for the discharge. A successful plaintiff must prove that his or her discharge was due solely to the filing of a worker's compensation claim. Such an investigation is "inextricably intertwined with consideration of the terms of the labor contract;" in that, the Momence collective bargaining agreement requires "good and sufficient

cause" for a proper dismissal. Sections 4 and 8. The United States Supreme Court stated in Teamsters v. Lucks Flour Company, 360 U.S. 95 (1962) that the meaning given to the terms in collective bargaining agreements must be determined by federal law.

> [T]he subject matter of section 301(a) "is peculiarly one that calls for uniform law" . . . . The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might some day be invoked in enforcing the contract. Once the collective bargain was made, the possibility of conflicting substantive interpretation

> under competing legal systems would tend to stimulate and prolong disputes as to its interpretation . . . [and] might substantially impede the parties' willingness to agree to contract terms providing for final arbitral or judicial resolution of disputes.

Id. at 103-104 (footnotes omitted). For these reasons the Supreme Court in Lucas Flour and in Allis-Chalmers held that a suit in state court alleging a violation of a provision of a labor contract must be brought under section 301 and be resolved by reference to federal law. "A state rule that purports to define the meaning or scope of a term in a contract suit therefore is preempted by federal labor law." 53 U.S.L.W. 4463, 4465, 85 L. Ed.2d 206, 215.

The plaintiffs, however, have argued that the United States Supreme Court in Allis-Chalmers reaffirmed that state laws which create and enforce

certain noncontractual employee rights cannot be preempted because they may not be altered or waived by contract. These state laws may coexist with federal labor law. See 53 U.S.L.W. 4463, 4465, 85 L. Ed.2d 206, 215. The plaintiffs urge this court to rule that the right to sue in tort in state court is such an independent, noncontractual right conferred upon employees by the state. The plaintiffs misstate the right which avoids preemption; it is the right to file a worker's compensation claim without retaliation. This right may exist independently of any contractual obligations between unionized employees and their employers. Midgett v. Sackett-Chicago, Inc., 105 Ill.2d 143 (1983). However, the right to file worker's compensation claims is not the equivalent of a right to file a state tort claim for

retaliatory discharge. A unionized employee must first present his claim of retaliatory discharge as a grievance. Federal law requires a unionized employee to exhaust contractually created grievance procedures before filing suit in a court for a discharge in violation of the collective bargaining agreement. Republic Steel Corporation v. Maddox, 379 U.S. 650 (1965). The right to file a worker's compensation claim is not altered or compromised by the federal preemption of the state tort action. A collective bargaining agreement cannot allow an employer to violate the Illinois state prohibiting retaliation for filing a worker's compensation claim. Such a contract would be unenforceable. Vantine v. Elkhart Brass Mfg., 762 F.2d 511 (7th Cir. 1985) (Indiana statute prohibiting contracts which derogate right to collect

benefits pursuant to Worker's Compensation Act construed).

IT IS THEREFORE ORDERED that the defendant's motions to dismiss with prejudice are granted.

IT IS FURTHER ORDERED that the plaintiffs' motion to reconsider the order denying remand is denied.

The Clerk is directed to enter judgments accordingly.

ENTER this 21st day of November, 1987.

(sign)_____

HAROLD A. BAKER

Chief U.S. District Judge

In the

United States Court of Appeals

For the Seventh Circuit

Nos. 85-2971 and 86-1763

JONNA R. LINGLE,

Plaintiff-Appellant,

v.

NORGE DIVISION OF MAGIC CHEF, INC.,

Defendant-Appellee.

AND

PAMELA S. MARTIN,

Plaintiff-Appellant,

v.

CARLING NATIONAL BREWERIES, INC., a foreign corporation, G. HEILEMAN BREWING COMPANY, INC., a foreign corporation, d/b/a CARLING NATIONAL BREWERIES, JOHN SNYDER, and CHARLES RHEIN,

Defendants-Appellees.

Appeals from the United States District Court for the Southern District of Illinois, East St. Louis Division.
Nos. 85 C 1126 & 85 C 3321—**James L. Foreman**, *Chief Judge.*

ARGUED MAY 28, 1986 and NOVEMBER 6, 1986
CONSOLIDATED and REARGUED *en banc* APRIL 29, 1987—
DECIDED JUNE 23, 1987

Before BAUER, *Chief Judge*, CUMMINGS, WOOD, JR., CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, RIPPLE, and MANION, *Circuit Judges.*

FLAUM, *Circuit Judge*. These cases present issues of extreme importance affecting workers covered by collective bargaining agreements. We must decide whether a claim of retaliatory discharge, a claim of intentional interference with an employment contract, and a claim that certain discharge procedures are defective, are preempted by § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1982).[1] We conclude that § 301 preempts these state claims, and therefore affirm the judgments of the district court.

I.

A.

The facts underlying *Lingle* are not disputed. The plaintiff, Lingle, was an employee of the defendant Norge Division of Magic Chef, Inc., and was covered by a collective bargaining agreement. The agreement was effective during the period in which Lingle's dispute arose.

On December 5, 1984, Lingle notified her employer that she had sustained an injury while employed at its facility in Herrin, Illinois. The plaintiff, relying on the Illinois Workers' Compensation Act, requested that Norge pay her medical bills. On December 11, 1984, Norge fired the plaintiff on the ground that she had filed a false worker's compensation claim. Lingle asserts that she was discharged solely in retaliation for exercising her worker's compensation rights.

Article 26 of the collective bargaining agreement provided that an employee could not be discharged except

[1] Section 301(a) broadly vests jurisdiction in the federal courts over all suits for "violation[s] of contracts between an employer and a labor organization representing employees in an industry affecting commerce. . . ." 29 U.S.C. § 185(a) (1982). Jurisdiction is bestowed "without respect to the amount in controversy or without regard to the citizenship of the parties." *Id.*

for just cause.[2] The agreement also contained, in Article 8.5, mandatory arbitration and grievance procedures that were to be the exclusive remedy for all disputes. The same day that Lingle was fired, the union filed a grievance on plaintiff's behalf, denying Norge's assertion that her worker's compensation claim was false. She has successfully arbitrated that claim, and received reinstatement and back pay.

On July 9, 1985, Lingle filed suit in the Circuit Court for Williamson County, Illinois. In her complaint, she alleged that she had been discharged in violation of Illinois law.

On August 21, 1985, Norge removed the case to federal court on the basis of diversity. On September 16, 1985, Norge moved to stay the proceedings in the district court or, in the alternative, to dismiss the case for lack of subject matter jurisdiction. Norge's theory was that the claim was preempted. The plaintiff argued that her claim was independent of any rights or remedies contained in the collective bargaining agreement.

The district court, relying on *Allis Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904 (1985), held that Lingle's retaliatory discharge claim was preempted by § 301, because it was inextricably interwined with the collective bargaining agreement. The district court, concluding that her claim was a § 301 claim, dismissed the case for failure to exhaust the grievance and arbitration procedures provided by the collective bargaining agreement. *See Lingle v. Norge Division of Magic Chef, Inc.*, 618 F.Supp. 1448 (S.D. Ill. 1985).

[2] Article 26.2 of Lingle's collective bargaining agreement provides in part:

> [T]he right of the employer to discharge or suspend an employee for just cause is recognized.

B.

The facts underlying *Martin* are somewhat in dispute. The plaintiff was an employee of the defendant Carling National Brewery, and was covered by a collective bargaining agreement. The collective bargaining agreement was negotiated between the Teamsters Local Union No. 50 and G. Heileman Brewing Company, and was effective from August 4, 1979, through November 27, 1983.

On June 26, 1983, the plaintiff was injured in Cellar No. 7 at the Carling National Brewery located in Belleville, Illinois. The injury occurred in the course of her employment. Thereafter, on June 28, 1983, the plaintiff was discharged. Martin alleges that she was discharged for expressing her intent to file a worker's compensation claim. Subsequently she did file such a claim. On June 30, 1983, a meeting was scheduled between the plaintiff and Charles Rhein, the industrial relations manager of the defendant G. Heileman Brewing Company, to discuss plaintiff's discharge. The plaintiff did not attend this meeting.

Article XVI of the collective bargaining agreement, the termination of seniority clause, provided that an employee could not be discharged or disciplined except for just cause.[3] Article XI contained mandatory arbitration and grievance procedures. Rather than follow these procedures, the plaintiff filed an eleven-count civil action on June 27, 1985, in the Circuit Court for St. Clair County, Illinois. In the first four counts she requested compensatory and punitive damages on the ground that she was discharged solely because she had stated her intention to exercise her rights under the Illinois Workers' Compensation Act. Count V was directed against an employee, John Snyder, for intentional interference with her employ-

[3] Article XVI of Martin's collective bargaining agreement provides in part:

> No employee who has completed the probationary period and attained regular full time status shall be discharged or disciplined except for just cause.

ment contract with the G. Heileman Company. This count, like counts I through IV, made no reference to the collective bargaining agreement, but rather alleged that a contractual relationship beyond the collective bargaining agreement existed between plaintiff and the G. Heileman Company.

Counts VI and VII of the complaint were directed against defendant Rhein for negligently and willfully failing to correctly implement discharge procedures. Counts VIII and IX were against Carling National Brewery and the G. Heileman Company, respectively, alleging the same theory of liability as counts VI and VII on the ground that the two companies were responsible for the actions of their agent Rhein. Counts X and XI contained the same allegations as counts VIII and IX, but requested punitive damages. Counts VI through XI made no reference to the collective bargaining agreement.

On August 14, 1985, the defendants removed the case to the United States District Court for the Southern District of Illinois, alleging that the plaintiff's claim was based upon § 301 of the Labor Management Relations Act, 29 U.S.C. § 185(a) (1982). Removal was asserted under 28 U.S.C. § 1441, on the basis that the district court had original jurisdiction pursuant to 29 U.S.C. § 185(a).

Plaintiff filed a motion to remand pursuant to 28 U.S.C. § 1445(c), which provides that:

> A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.

Martin argued that none of the counts in her complaint were removable, or in the alternative, that counts I through IV should be severed and remanded as required by § 1445(c).

On January 21, 1986, the district court denied the plaintiff's motion to remand. Relying on his prior decision in *Lingle v. Norge Division of Magic Chef, Inc.*, 618 F. Supp. 1448 (S.D. Ill. 1985), Judge Foreman found that all eleven counts were preempted by § 301, because they were "in-

extricably intertwined with considerations of the terms of [the] collective bargaining agreement and its provisions which provide for termination only upon just cause." *Martin v. Carling National Breweries, Inc.*, No. 85-3321 (S.D. Ill. Jan. 21, 1986) (order denying remand). On April 11, 1986, the district court dismissed the plaintiff's lawsuit because of, *inter alia*, the plaintiff's failure to exhaust the grievance and arbitration machinery provided by the collective bargaining agreement.

II.

On these appeals we must decide whether the plaintiffs' claims were removable, and if so, whether they were preempted by § 301. In order to determine removability we must examine, as a matter of federal law, the nature of the plaintiffs' claims. We briefly discuss the development of the tort of retaliatory discharge in Illinois to aid our determination of whether federal law encompasses the plaintiffs' claims.

The Supreme Court of Illinois first announced the tort of retaliatory discharge in *Kelsay v. Motorola, Inc.*, 74 Ill. 2d 172, 384 N.E.2d 353 (1978). The Illinois court established this cause of action, which it labeled as a "tort," 384 N.E.2d at 358, for those workers who were fired because they filed worker's compensation claims. The court limited the application of its decision to at-will employees who, the court felt, were otherwise subject to an employer's absolute power to terminate. *Id.* at 357. The court stated that the purpose of this tort was to uphold and implement the public policy of the Workers' Compensation Act of Illinois, Ill. Rev. Stat. ch. 48, ¶¶ 138.1-138.30 (1986).[4] *Kelsay*, 384 N.E.2d at 357. The court did not,

[4] The court noted that:

> [T]he legislature enacted the workman's compensation law as a comprehensive scheme to provide for efficient and expeditious remedies for injured employees. This scheme would be

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however, characterize this new cause of action as an addition to the worker's compensation laws.

"The dual emphasis in *Kelsay* upon the public policy underlying the Workers' Compensation Act, and the plight of the at will employee created uncertainty about the scope of the retaliatory discharge tort." *Comment, Retaliatory Discharge—Illinois' Extension of Retaliatory Discharge Tort Actions to Employment Relationships Governed by Collective Bargaining Agreements: New Obstacles Imposed By Federal Labor Law Preemption*, 1985 S. Ill. L. Rev. 707, 709 (footnote omitted). This uncertainty was resolved in *Midgett v. Sackett-Chicago, Inc.*, 105 Ill. 2d 143, 473 N.E.2d 1280 (1984), *cert. denied*, 106 S.Ct. 278 (1985), in which the court held that an employee covered by a collective bargaining agreement could file suit against an employer if the employer had discharged the employee in retaliation for seeking benefits under the Workers' Compensation Act. The court reasoned that unless it extended its judicially created tort remedy to employees covered by collective bargaining agreements, an employer, who was a party to a collective bargaining agreement, could only be obligated to give back pay, and could not be held liable for punitive damages for violating an important public policy of the State of Illinois. *Midgett*, 473 N.E.2d at 1284. The Illinois court further held that extending the cause of action to such employees would not have an adverse effect on congressionally favored grievance and arbitration procedures. *Id.* However, the court expressly declined to reach the issue of federal preemption.

Midgett was reaffirmed in *Boyles v. Greater Peoria Mass Transit Dist.*, 113 Ill. 2d 545, 499 N.E.2d 435, 439 (1986). The *Boyles* court held that an employee who is

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[4] *continued*
seriously undermined if employers were permitted to abuse their power to terminate by threatening to discharge employees for seeking compensation under the Act.

Kelsay, 384 N.E. 2d at 357.

covered by a collective bargaining agreement may bring a retaliatory discharge suit against a public entity employer, even though the public entity is not subject to an award of punitive damages. *Boyles*, 499 N.E.2d at 439. The Illinois Supreme Court, once again, did not discuss the effect of federal preemption on the state tort claim.

Most recently, the Illinois Supreme Court in *Gonzalez v. Prestress Engineering Corp.*, 115 Ill. 2d 1, 503 N.E.2d 308 (1986), was faced directly with the issue of whether the tort of retaliatory discharge is preempted by federal labor law. In both cases consolidated for review in *Gonzalez*, the employees were covered by a collective bargaining agreement that contained a just cause discharge provision. Both workers filed worker's compensation claims and were subsequently discharged. Instead of following the grievance procedures that were set forth in the collective bargaining agreement to challenge their discharge, the plaintiffs filed suit in state court alleging retaliatory discharge.

The Illinois Supreme Court, after discussing *Allis-Chalmers v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904 (1986), held that the plaintiffs' retaliatory discharge claims were not preempted. The court distinguished two of its prior decisions that seemed to weigh against its holding.[5] The

[5] The Illinois Supreme Court in both *Koehler v. Illinois Central Gulf Railroad Co.*, 109 Ill. 2d 473, 488 N.E.2d 542, *cert. denied*, 106 S.Ct. 3297 (1986), and *Bartley v. University Asphalt Co.*, 111 Ill. 2d 318, 489 N.E.2d 1367 (1986), recognized situations in which certain workers, despite the public policy of the State of Illinois, could not assert a retaliatory discharge claim. In *Koehler*, the court held that the Railway Labor Act, 45 U.S.C. §§ 151-163 (1982), preempted the tort of retaliatory discharge. *Accord Graf v. Elgin, Joliet & Eastern Railway Co.*, 790 F.2d 1341 (7th Cir. 1986); *Jackson v. Consolidated Rail Corp.*, 717 F.2d 1045 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007, 104 S.Ct. 1000 (1984). In *Bartley*, the Illinois Supreme Court once again limited the availability of the tort of retaliatory discharge. The court held that the plaintiff's state tort claim for civil conspiracy, which alleged that he was discharged in retaliation for cooperating with the Federal

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court concluded that the claims were not preempted because the tort of retaliatory discharge was grounded in Illinois public policy, "which, regardless of the existence or absence of a collective-bargaining agreement, confers upon all employees and employers certain nonnegotiable rights and imposes certain nonnegotiable duties and obligations." *Gonzalez*, 503 N.E.2d at 312. Justice Ryan, in dissent, however, pointed out that "[w]hether or not one agrees that as a matter of State law 'just cause' includes retaliatory discharge is simply irrelevant. . . . Thus, a State court lacks authority to declare that as a matter of State law a given claim is or is not within the scope of the 'just cause' provision." *Id.* at 315 (dissenting opinion).

With this background and understanding of the tort of retaliatory discharge in Illinois, we now reach the merits of the parties' contentions.

III.

A.

A federal court may not, of course, address the merits of a claim without first determining whether it has jurisdiction. Accordingly, when a case is removed to federal district court under 28 U.S.C. § 1441(b)[6], the court must

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[5] *continued*
Bureau of Investigation, was inextricably intertwined with the terms of his labor contract, *id.* at 1373, and was, therefore, preempted, *id.* at 1373-74 (*citing Vantine v. Elkhart Brass Mfg. Co.*, 762 F.2d 511 (7th Cir. 1985) and *Lingle v. Norge Division of Magic Chef, Inc.*, 618 F.Supp. 1448 (S.D. Ill. 1985)). In *Gonzalez*, however, the court distinguished both *Koehler* and *Bartley* on factual grounds.

[6] Section 1441 provides in part:

> (a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the

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be assured that the claim arises under the Constitution, treaties, or laws of the United States. Only after a court finds that it has jurisdiction may it reach the merits.

In *Martin*, the district court discussed the preemption issue and then found it had jurisdiction. The *Martin* court apparently reasoned that if the claim was preempted by § 301, the court necessarily had jurisdiction. Although the district court reached the correct result, it decided these issues in reverse order. In *Lingle*, the district court addressed only the preemption issue.

Because of the confusion surrounding the proper approach to a § 301 preemption claim that is removed to a district court, we now set forth the proper analytical framework. *See Caterpillar Inc. v. Williams*, 55 U.S.L.W. 4804, 4805-06 (June 9, 1987); Twitchell, *Characterizing Federal Claims: Preemption, Removal, and the Arising-Under Jurisdiction of the Federal Courts*, 54 Geo. Wash. L. Rev. 812 (1986) (hereinafter "Twitchell"). A federal court must first determine whether it has jurisdiction. In a case originally brought in a state court, this requires the federal court to determine whether the suit was properly removed. Then, and only then, may a court determine whether or not federal law preempts the state cause of action.[7] To decide the preemption issue, before deter-

[6] *continued*

district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

28 U.S.C. § 1441 (1986).

[7] This is also the Supreme Court's approach. For instance, in *Franchise Tax Board v. Construction Laborers Vacation Trust*,

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mining whether proper jurisdiction exists, is to allow the tail to wag the dog. We have in several cases followed the correct approach, although without expressly setting forth the proper analytical framework. *See, e.g., Mitchell v. Pepsi-Cola Bottlers, Inc.*, 772 F.2d 342 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 1266 (1986); *Oglesby v. RCA Corp.*, 752 F.2d 272 (7th Cir. 1985).

Our analysis will follow several steps. We begin with the principle that, because a federal court must always determine its own jurisdiction *de novo*, state court characterizations of a claim are not binding on the federal court. Thus, even if a state views a cause of action, such as retaliatory discharge, as part of its worker's compensation laws, 28 U.S.C. § 1445(c), which precludes the removal of state worker's compensation actions, would not necessarily bar removal. Based upon this principle, we find that, in this case, 28 U.S.C. § 1445(c) is not a bar to removal. We then discuss the general principles of removal jurisdiction and note that a federal court may, in some

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[7] *continued*

463 U.S. 1, 103 S.Ct. 2841 (1983), the Court stated, in referring to *Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 88 S.Ct. 1235 (1968), that:

> [In *Avco*] the petitioner's action "arose under" § 301, and thus could be removed to federal court, although the petitioner had undoubtedly pleaded an adequate claim for relief under the state law of contracts and had sought a remedy available *only* under state law. The necessary ground of decision was that the preemptive force of § 301 is so powerful as to displace entirely any state cause of action "for violation of contracts between an employer and a labor organization." Any such suit is purely a creature of federal law, notwithstanding the fact that state law would provide a cause of action in the absence of § 301. *Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily "arises under" federal law.

Id., 463 U.S. at 24, 103 S.Ct. at 2853-54 (footnote omitted) (emphasis in original); *see also Caterpillar Inc.*, 55 U.S.L.W. at 4806 ("The complete pre-emption corollary to the well-pleaded complaint rule is applied primarily in cases raising claims pre-empted by § 301 of the LMRA.").

situations, look beyond the face of the complaint to determine whether a plaintiff has artfully pleaded her suit so as to couch a federal claim in terms of state law. We conclude that, in these cases, the plaintiffs' claims actually arose under federal law and are therefore removable. The next step is to determine whether federal law preempts the plaintiffs' claims. We discuss the differences in the types of labor law preemption, conclude that the preemption cases that discuss § 301 are controlling, and hold that the plaintiffs' claims are preempted. Finally, we hold that, because the plaintiffs did not exhaust their administrative remedies, dismissal of each suit was proper.

B.

A suit may be removed to federal district court under 28 U.S.C. § 1441(a) only if it could have been brought there originally. *Illinois v. Kerr-McGee Chemical Corp.*, 677 F.2d 571, 574 (7th Cir. 1982). Under § 1441(b) a defendant may remove a cause of action presenting a federal question to a federal court without regard to diversity of citizenship. *Mitchell*, 772 F.2d at 344. However, § 1445(c) limits § 1441 by barring the removal of a suit if it arises under the worker's compensation laws of a state.

The plaintiffs argue that section 1445(c) of Title 28 of the United States Code bars the removal of their retaliatory discharge claims, because these claims arise under the Workers' Compensation Act of Illinois. We must first determine, therefore, whether or not § 1445(c) bars the removal of the plaintiffs' retaliatory discharge claims. We conclude that § 1445(c) does not bar removal of the plaintiffs' claims, because each plaintiff has asserted a claim for breach of the collective bargaining agreement and not a worker's compensation claim. *See Vantine v. Elkhart Brass Mfg. Co.*, 762 F.2d 511, 517 (7th Cir. 1985) ("In view of the fact that the employee has a cause of action for breach of the collective bargaining agreement, the claim does not arise under the Indiana Workman's Compensation Act, and thus federal jurisdiction is not barred under 28 U.S.C. § 1445(c).").

Section 1445(c) was passed to help ease the burden on the federal court dockets. S. Rep. No. 1830, 85th Cong., 2d Sess. 7-8, *reprinted in* 1958 U.S. Code Cong. & Admin. News 3099, 3106. Congress apparently felt that removal of state worker's compensation claims to federal court would nullify the "expedit[ious] and inexpensive" procedures that the states had set up. *Id.* at 8, *reprinted in* 1958 U.S. Code Cong. & Admin. News at 3106. It was Congress' intent that "the workman [have] the option to file his case in either the Federal or the State court. If he files in State court it is not removable to the Federal court." *Id.* Section 1445(c) thus bars removal of all worker's compensation claims. *See, e.g., Alexander v. Westinghouse Hittman Nuclear, Inc.*, 612 F.Supp. 1118 (N.D. Ill. 1985) (§ 1445(c) bars removal even if diversity exists); *Thomas v. Kroger Co.*, 583 F.Supp. 1031 (S.D. W.Va. 1984).

The plaintiffs claim that, as a matter of state law, their retaliatory discharge claims arise under the Illinois Workers' Compensation Act. Although the Illinois Supreme Court has stated that its purpose in creating the retaliatory discharge cause of action was to protect the public policy concerns that underlie the Illinois Workers' Compensation Act, it has referred to retaliatory discharge as a tort. *See Kelsay*, 384 N.E.2d at 358.

Even if the Illinois courts had labeled the tort of retaliatory discharge as one arising under the Illinois Workers' Compensation Act, thus ostensibly barring removal under § 1445(c), that determination would not necessarily be binding on this court.[8] *See Standard Oil Co. of Califor-*

[8] This, of course, holds equally true for state statutes. *See, e.g.*, Ill. Rev. Stat. ch. 48, ¶ 138.4(h) (1986) (retaliatory discharge for filing a worker's compensation claim unlawful). Thus, neither a state legislature nor state courts may interfere with the federal labor law scheme.

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nia v. Johnson, 316 U.S. 481, 483, 62 S. Ct. 1168, 1169 (1942). This is because the meaning of "workmen's compensation laws" in § 1445(c) is a matter of federal law, regardless of the label a state may give an action. This would hold true even if a state, as some do, classified retaliatory discharge as a breach of contract claim. *See, e.g., Brockmeyer v. Dun & Bradstreet*, 113 Wis. 2d 561, 335 N.W.2d 834 (1983). If retaliatory discharge is classified as a contract claim, the collective bargaining agreement would clearly be implicated. As we recently said: "The state cannot be allowed, merely by the label it attaches to the cause of action, to interfere with the administration of a federal statute." *Graf v. Elgin, Joliet & Eastern Railway Co.*, 790 F.2d 1341, 1345 (7th Cir. 1985); *see Allis-Chalmers v. Lueck*, 471 U.S. 202, 218 n.13, 105 S.Ct. 1904, 1915 n.13 (1985). If the Illinois court's determination of the claim in this case were binding upon this court, the entire federal framework of collective bargaining would be undermined. That is, the burden of resolving labor disputes would be shifted to the courts, rather than being resolved by arbitration, thus frustrating the policy underlying the federal labor laws.

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[*] *continued*

In *Gonzalez*, the Illinois Supreme Court stated:

> It bears noting that even if the labor contract covering Gonzalez and Repyak recited the rights and obligations arising under the Workers' Compensation Act and expressly provided that a discharge in contravention of the Act was without "just cause," the claims would still fall entirely outside the preemptive sphere of section 301. Neither an employer nor a union can strip an employee of the protections of Illinois law by merely restating the rights and obligations that arise thereunder in a private labor agreement.

Gonzalez, 503 N.E.2d at 313. We reject this reasoning. The Supreme Court has stated that whether a state tort claim is "sufficiently independent of federal contract interpretation to avoid preemption is, of course, a question of federal law," *Lueck*, 105 S.Ct. at 1913; otherwise each state would be "free to decide what 'just cause' means or does not mean. . . ." *Gonzalez*, 503 N.E.2d at 316 (Ryan, J., dissenting).

A state court's characterization of a claim cannot be binding on a federal court not only because of the policy underlying the federal labor laws, *see Graf*, 790 F.2d at 1345, but also, and more important, because federal courts are courts of limited jurisdiction and have the duty to examine their jurisdiction *de novo* in each case. A state court can neither enlarge federal judicial power nor narrow it by characterizing a federal claim as a state claim. To do so would be to allow a state court to defeat a congressional directive. The determination of whether the tort of retaliatory discharge arises under federal law, and is therefore removable, is a federal question. *See Standard Oil Co.*, 316 U.S. at 483, 62 S.Ct. at 1169. We conclude that the plaintiffs' retaliatory discharge claims arise under federal law, so that § 1445(c) does not bar removal.[9]

We must next determine if the requirements of § 1441 are met. Section 1441(b) permits removal if the complaint raises a federal question. A federal court must, as a matter of federal law, examine a state claim *de novo* to determine whether it raises a federal question. Thus, while the nature of the state tort is a matter of state law, the question of whether the state tort is sufficiently independent of the collective bargaining agreement so as to avoid removal is a question of federal law. *See Lueck*, 471 U.S. at 213-14, 105 S.Ct. at 1912-13. Therefore, we must now decide, as a matter of federal law, whether the plaintiffs' retaliatory discharge claims actually arise under federal law.

One method for determining whether a claim arises under federal law is to apply the "well-pleaded complaint"

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[9] Our view that the tort of retaliatory discharge is not a worker's compensation law is supported by the fact that, as a matter of federal law, worker's compensation laws provide limited no-fault compensation for an injury; this limit on damages is in exchange for the elimination of general tort rules and defenses. *See Larson, Workmen's Compensation* § 1.10 (desk ed. 1986). The Illinois tort of retaliatory discharge lacks, for purposes of § 1445(c), the essential elements of a worker's compensation law.

rule, which is one of the most basic principles of federal court jurisdiction. This rule provides that the "federal claim must generally appear on the face of the complaint unaided by any other pleadings, including a removal petition." *Oglesby*, 752 F.2d at 275. However, a necessary exception to the well-pleaded complaint rule is the "artful pleading" doctrine. This doctrine provides that, although a plaintiff is the "master" of his or her complaint, *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 22, 103 S.Ct. 2841, 2853 (1983), he or she may not purposely frame his or her action under state law and omit the federal questions that are essential to recovery. *Id.*; *Saturday Evening Post Co. v. Rumbleseat Press, Inc.*, No. 86-1397, slip op. at 6 (7th Cir. Apr. 14, 1987); *Williams*, 786 F.2d at 931; *Mitchell*, 772 F.2d at 344; *Oglesby*, 752 F.2d at 275.

In *Martin*, the defendants removed the plaintiff's suit to federal court on the basis that all of her claims arose under § 301.[10] In *Lingle*, the defendant removed the plaintiff's suit on the basis of diversity. Under the well-pleaded complaint rule, removal would not be proper in either case, because the plaintiffs have not stated a federal claim on the face of their complaints. However, the artful pleading doctrine requires us to look more closely at the plaintiffs' allegations. *See Williams*, 786 F.2d at 930-33; *cf. Leu v. Norfolk & Western Railway Co.*, No. 86-1377, slip op. at 12 (7th Cir. May 8, 1987) ("Appellants cannot, through 'artful pleading,' disguise claims that are within the jurisdictional scope of the RLA. . . ."). After examining the plaintiffs' state claims *de novo*, to determine

[10] "Section 301 confers original jurisdiction on the district courts over suits for violation of collective bargaining agreements negotiated by labor organizations and employers in industries affecting commerce." *Mitchell*, 772 F.2d at 344. For jurisdiction to be proper under § 301(a), it is necessary that the suit be based upon an alleged breach of the collective bargaining agreement, and that the resolution of the plaintiff's suit be governed by the terms of that agreement. *Williams*, 786 F.2d at 935.

whether a federal question is raised, we conclude that the plaintiffs' claims of retaliatory discharge, and Martin's other claims, are artfully pleaded claims for wrongful discharge under the collective bargaining agreements. Therefore, removal was proper, because both complaints stated claims that arose under federal law. *See Avco Corp. v. Aero Lodge No. 735*, 390 U.S. 557, 560, 88 S.Ct. 1235, 1237 (1968) ("It is thus clear that the claim under th[e] collective bargaining agreement is one arising under the laws of the United States within the meaning of the removal statute. . . . It likewise seems clear that this suit is within the 'original jurisdiction' of the District Court within the meaning of 28 U.S.C. §§ 1441(a) and (b).").[11]

C.

We have consistently held that claims of retaliatory discharge brought by a worker who is covered by a collective bargaining agreement are actually claims for wrongful discharge under the collective bargaining agreement. Therefore, these claims arise under federal law, and removal is proper.

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[11] The Supreme Court recently has explained, in adopting the reasoning of *Avco* to ERISA claims, the difference between the ordinary situation where federal preemption is a defense to a plaintiff's suit and the special role federal preemption plays under § 301. *Metropolitan Life Insurance Co. v. Taylor*, 107 S.Ct. 1542, 1546 (1987).

> Federal pre-emption is ordinarily a federal defense to the plaintiff's suit. As a defense, it does not appear on the face of a well-pleaded complaint, and, therefore, does not authorize removal to federal court. . . . One corollary of the well-pleaded complaint rule developed in the case law, however, is that Congress may so completely pre-empt a particular area, that any civil complaint raising this select group of claims is necessarily federal in character. For 20 years, this Court has singled out claims pre-empted by § 301 of the Labor Management Relations Act (LMRA), 29 U.S.C. § 185, for such special treatment.

Metropolitan Life, 107 S.Ct. at 1546 (citations omitted); *see also Caterpillar Inc. v. Williams*, 55 U.S.L.W. 4804, 4805-06 (June 9, 1987).

In *Oglesby v. RCA Corp.*, 752 F.2d 272 (7th Cir. 1985), the plaintiff refused to perform his work because he had not been provided the necessary tools or clothing as required by OSHA. He alleged that he was discharged because of his refusal. We stated that:

> [The] plaintiff has simply alleged a cause of action for wrongful discharge and if shown to be in violation of a collective bargaining agreement subject to Section 301, LMRA, the action arises under federal law and the fact that it was not characterized in the complaint as a federal claim is not determinative.

Id. at 276 (citations omitted).

In *Vantine v. Elkhart Brass Mfg. Co.*, 762 F.2d 511 (7th Cir. 1985), the employee was covered by a collective bargaining agreement that had a "just cause" provision. Vantine alleged, as have the plaintiffs here, that he was discharged in retaliation for filing a worker's compensation claim, and that this action interfered with his "employment contract rights." *Id.* at 515. The case was removed to the district court, because the complaint's theory of liability was based on § 301. *Id.* at 516.

We noted in *Vantine* that the Indiana Supreme Court had created a tort action for retaliatory discharge for at-will employees. *See id.* at 517 (*citing Frampton v. Central Indiana Gas Co.*, 260 Ind. 249, 297 N.E.2d 425 (1973)). We concluded that, "because the goals and policies of the Indiana Workmen's Compensation Act are protected by the collective bargaining agreement, *Frampton* does not apply to employees covered by collective bargaining agreements." *Id.* at 517. Although we discussed state law, we based our decision on our own review of whether the cause of action arose under state or federal law. We noted that "because an allegation for filing a workmen's compensation claim is an allegation of a breach of the collective bargaining agreement, it arises under . . . [§ 301] rather than the Indiana Workmen's Compensation Act," *id.* Similarly, in this case, although the plaintiff's claim is based on a state tort, it is actually a claim for a breach of the collective bargaining agreement.

Another case from this circuit, *Mitchell v. Pepsi-Cola Bottlers, Inc.*, 772 F.2d 342 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 1266 (1986), involved a plaintiff's claim of "tortious termination of employment." The plaintiff argued that "his involuntary resignation claim [could] not implicate the collective bargaining agreement . . . because the defendant did not discharge plaintiff, but sought to avoid the provisions of the collective bargaining agreement by forcing the plaintiff to resign involuntarily." *Mitchell*, 772 F.2d at 346. We concluded that plaintiff had given too narrow an interpretation to the just cause provision, and held that plaintiff's claim arose under the collective bargaining agreement, and therefore presented a federal question, making removal proper.

The case law in our circuit is clear: a claim of retaliatory discharge by a worker covered under a collective bargaining agreement with a "just cause" provision states a claim under the collective bargaining agreement. Lingle's and Martin's retaliatory discharge claims, therefore, necessarily arise under federal law. *See Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912 (1957) (federal law governs § 301 claims).

Martin's other claims also arise under the collective bargaining agreement, and therefore are removable as § 301 claims. Count V alleges an interference with both her employment rights and contract of employment. Counts VI through XI allege that the defendants maintained a defective discharge procedure. We reject Martin's claim that an employment contract, separate and apart from the collective bargaining agreement, existed between her and the defendants. The only contract controlling her employment rights is the collective bargaining agreement. Thus, we conclude that Count V is artfully pleaded and arises under § 301. Counts VI through XI state claims that are subsumed by the discharge procedures of the collective bargaining agreement; therefore, these claims also arise under § 301 and are properly removable. All of the counts raised in Martin's complaint, therefore, require a determination of whether, under the collective bargaining

agreement, she was discharged for just cause. *See Leu v. Norfolk & Western Railway Co.*, No. 86-1377, slip op. at 10 (7th Cir. May 8, 1987) ("The appellants cannot escape the exclusive governance of the RLA by articulating their claim in terms of a state tort action."). Thus, federal law is controlling, and the suit was properly removed.

We conclude by holding that the first issue in a § 301 removal case is whether federal law provides a plaintiff with a cause of action to remedy the wrongs he or she asserts. *See Mitchell*, 772 F.2d at 344; *Oglesby*, 752 F.2d at 275. Once a court determines that a plaintiff's complaint—either on its face or as artfully pleaded—states a claim for a federal remedy, as in these cases, then the district court may conclude that removal is proper. The next step is for the court to determine whether or not the suit is preempted.

IV.

A.

The Supreme Court has articulated several distinct preemption principles in the context of the labor laws. One principle, the *Garmon* rule, prohibits the states from regulating activities that are protected, or prohibited, or arguably so affected, by the NLRA. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 79 S.Ct. 773 (1959). *Garmon* preemption protects the primary jurisdiction of the National Labor Relations Board. A similar preemption principle precludes state regulation of conduct that Congress intended to be left unregulated. *See Machinists v. Wisconsin Employment Relations Commission*, 427 U.S. 132, 96 S.Ct. 2548 (1976).

We are concerned here with a preemption principle distinct from those above—the preemptive effect of § 301. *See Lincoln Mills*, 353 U.S. 448, 77 S.Ct. 912 (1957). This last type of preemption is based upon the necessary federal protection of a uniform body of federal labor law. *Local 174, Teamsters v. Lucas Flour*, 369 U.S. 95, 103-04, 82 S.Ct. 571, 576-77 (1962). Consequently, unlike *Garmon*

preemption, which balances state and federal interests, *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 213 n.9, 105 S.Ct. 1904, 1913 n.9 (1985), § 301 preemption requires that "incompatible doctrines of local law must give way to principles of federal labor law," *Lucas Flour*, 369 U.S. at 102, 82 S.Ct. at 576 (footnote omitted); *see also Lueck*, 471 U.S. at 212-13, 105 S.Ct. at 1912. The cases applying other labor law preemption principles are, therefore, irrelevant to our determination here. *See Gibson v. AT&T Technologies, Inc.*, 782 F.2d 686, 688-89 (7th Cir.), *cert. denied*, 106 S.Ct. 3275 (1986).

The Supreme Court has made clear that where the right to recovery depends on an interpretation of a collective bargaining agreement, § 301 requires federal law to govern. *Lincoln Mills*, 353 U.S. at 456, 77 S.Ct. at 918. In *Lucas Flour*, the Court stated that the "dimensions of § 301 require the conclusion that substantive principles of federal labor law must be paramount in the area covered by the statute." *Lucas Flour*, 369 U.S. at 103, 82 S.Ct. at 576. The Court thought a uniform federal law was required because:

> The possibility that individual contract terms might have different meanings under state and federal law would inevitably exert a disruptive influence upon both the negotiation and administration of collective agreements. Because neither party could be certain of the rights which it had obtained or conceded, the process of negotiating an agreement would be made immeasurably more difficult by the necessity of trying to formulate contract provisions in such a way as to contain the same meaning under two or more systems of law which might someday be invoked in enforcing the contract. Once the collective bargain was made the possibility of conflicting substantive interpretation under competing legal systems would tend to stimulate and prolong disputes as to its interpretation.

Lueck, 471 U.S. at 210, 105 S.Ct. at 1910-11 (*quoting Lucas Flour*, 369 U.S. at 103-04, 82 S.Ct. at 577).

A recent Supreme Court decision that has addressed the issue of the preemptive effect of § 301 is *Lueck*, *supra*.[12] In *Lueck*, the employee alleged that the employer had hindered his receipt of insurance proceeds as provided for in the collective bargaining agreement. The Court, in responding to the employee's argument that his claim was not preempted, stated that, "[w]ere state law allowed to determine the meaning intended by the parties in adopting a particular phrase or term, all the evils addressed in *Lucas Flour* would recur." *Lueck*, 471 U.S. at 211, 105 S.Ct. at 1911. Building upon its decision in *Lucas Flour*, the Court concluded that:

> If the policies that animate § 301 are to be given their proper range, however, the preemptive effect of § 301 must extend beyond suits alleging contract violations. These policies require that 'the relationships created by [a collective-bargaining] agreement' [be] defined by application of an evolving federal common law grounded in national labor policy.

[12] In *Lueck*, an employee was entitled to benefits under an insurance policy that was part of a collective bargaining agreement. The collective bargaining agreement provided that all disputes were subject to a grievance procedure which culminated in final and binding arbitration. The plaintiff alleged that his employer harassed him and then hindered his receipt of benefits for which he had applied. Instead of complying with the grievance procedures, Lueck filed suit in state court against his employer for bad-faith handling of his insurance claims. The trial court granted the defendant's motion for summary judgment, holding that the plaintiff had stated a claim under § 301. The Wisconsin Court of Appeals affirmed. The Supreme Court of Wisconsin reversed, holding that the suit did not arise under § 301 and was not preempted. The court reasoned that the plaintiff's claim was independent of the contract. The Supreme Court reversed, finding that the claim arose under § 301. The Court also held that § 301 preempted not only state contract claims, but also state tort claims.

Lueck, 471 U.S. at 210-11, 105 S.Ct. at 1911 (citation omitted) (brackets in original).[13]

Recently, the Supreme Court in *International Brotherhood of Elec. Workers v. Hechler*, 55 U.S.L.W. 4694 (May 26, 1987), has reaffirmed *Lueck* and *Lucas Flour*. In *Hechler*, the Court was faced with the issue of whether a union employee's state tort claim that her union had breached its duty of care to provide her with a safe working place was sufficiently independent of the collective bargaining agreement to avoid preemption. The Court concluded that it would have to interpret the collective bargaining agreement to determine whether the union had assumed that duty. The Court stated:

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[13] The Court stated that:

> Since nearly any alleged willful breach of contract can be restated as a tort claim for breach of a good-faith obligation under a contract, the arbitrator's role in every case could be bypassed easily if § 301 is not understood to pre-empt such claims. Claims involving vacation or overtime pay, work assignment, *unfair discharge*—in short, the whole range of disputes traditionally resolved through arbitration—could be brought in the first instance in state court by a complaint in tort rather than in contract. A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness, *Republic Steel Corp. v. Maddox*, 379 U.S. 650, 653, 85 S.Ct. 614, 616, 13 L.Ed. 2d 580 (1965), as well as eviscerate a central tenet of federal labor-contract law under § 301 that it is the arbitrator, not the court, who has the responsibility to interpret the labor contract in the first instance.

Lueck, 471 U.S. at 219-20, 105 S.Ct. at 1915-16 (emphasis added).

The Court did, however, place limits on its holding.

> Clearly, § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to preempt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.

Id., 471 U.S. at 212, 105 S.Ct. at 1912 (footnote omitted).

> In order to determine the Union's tort liability . . . a court would have to ascertain, first, whether the collective bargaining agreement in fact placed an implied duty of care on the Union to ensure that Hechler was provided a safe workplace, and, second, the nature and scope of that duty, that is, whether, and to what extent, the Union's duty extended to the particular responsibilities alleged by respondent in her complaint. Thus, in this case, as in *Allis-Chalmers*, it is clear that "questions of contract interpretation . . . underlie any finding of tort liability." 471 U.S. at 218. The need for federal uniformity in the interpretation of contract terms therefore mandates that here, as in *Allis-Chalmers*, respondent is precluded from evading the pre-emptive force of § 301 by casting her claim as a state-law tort action.

Hechler, 55 U.S.L.W. at 4697 (footnote omitted). *Compare Caterpillar Inc. v. Williams*, 55 U.S.L.W. 4804 (June 9, 1987) (employees' claim that employer breached individual employment contract did not implicate collective bargaining agreement and was not preempted).

B.

Plaintiffs' claims for retaliatory discharge depend on an analysis of the terms of the collective bargaining agreements. Moreover, Martin's other claims, those in counts V through XI of her complaint, are also inextricably intertwined by their own terms, with her collective bargaining agreement. Both plaintiffs are seeking redress for a right that derives from the collective bargaining agreement. In *Graf*, we held that where a "worker is covered by a collective bargaining contract and therefore has a potential federal remedy, judicial or arbitrable, . . . that remedy is exclusive; the worker has no state remedies." *Graf*, 790 F.2d at 1346;[14] *see also Avco Corp. v. Aero*

[14] One district court has referred to this statement as "impermissibly overbroad." *La Buhn v. Bulkmatic Transport Co.*, 644 F.Supp. 942, 950 (N.D. Ill.), *appeal docketed*, No. 86-2664 (7th Cir.

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Lodge No. 735, 390 U.S. 557, 560, 88 S.Ct. 1235, 1237 (1968). That holding applies in this case as well, and is supported not only by *Lueck* but by the recent decisions in this circuit addressing the preemptive effect of § 301. The plaintiffs have, therefore, asserted state claims that are preempted by § 301.

The question of whether the tort of retaliatory discharge is preempted by the federal labor laws has been at issue in several recent cases in this court. *See, e.g., Graf v. Elgin, Joliet & Eastern Railway Co.*, 790 F.2d 1341 (1980) (A pendent state claim of retaliatory discharge is preempted by the Railway Labor Act.); *Vantine v. Elkhart Brass Mfg. Co.*, 762 F.2d 511 (7th Cir. 1985) (A claim for retaliatory discharge under Indiana law may not be asserted by workers covered under a collective bargaining agreement.). Moreover, the district courts in this circuit have been faced with this issue with increased frequency—although they have arrived at differing conclusions. *Compare Clark v. Momence Packing Co.*, 637 F.Supp. 16 (C.D. Ill. 1985), *appeal docketed*, No. 85-3165 (7th Cir. 1985) (finding the state tort of retaliatory discharge preempted) *and Waycaster v. AT&T Technologies*, 636 F. Supp. 1052 (N.D. Ill. 1986), *appeal docketed*, No. 86-1547 (7th Cir. 1986) (same) *and Hughes v. Pittsburgh Testing Lab*, 624 F.

[14] *continued*

1986). We believe that *Graf* was decided correctly in light of *Lueck*, and that the statement quoted above is the law in this circuit.

It is true, as the district court in *La Buhn* noted, that the tort of retaliatory discharge is based on Illinois public policy. Moreover, *Lueck* made it clear that § 301 does not allow the parties to contract for that which is illegal under state law. *Lueck*, 471 U.S. at 212, 105 S.Ct. at 1912. What the *La Buhn* court failed to understand is that where federal law provides a remedy (i.e., grievance procedures enforced through a collective bargaining agreement), and is meant to be exclusive, then overlapping or inconsistent state law must fall. We find this language in *La Buhn* to be inconsistent with both our previous decisions and with *Lueck*. The district courts in this circuit must, whether or not they agree with our reasoning or with the results we reach, follow our mandates.

Supp. 54 (N.D. Ill. 1985) (same) *and Lingle v. Norge Division of Magic Chef, Inc.*, 618 F.Supp. 1448 (S.D. Ill. 1985) (same) *with La Buhn v. Bulkmatic Transport Co.*, 644 F.Supp. 942, 945 (N.D. Ill. 1986), *appeal docketed*, No. 86-2664 (7th Cir. 1986) (no preemption of the worker's tort of retaliatory discharge claim for filing a safety complaint) (*citing Orsini v. Echlin, Inc.*, 637 F.Supp. 38 (N.D. Ill. 1986)) *and Daugherty v. Lucky Stores, Inc.*, 603 F. Supp. 975 (C.D. Ill. 1985) (same).

The recent Seventh Circuit opinions that have addressed the preemptive effect of § 301 are consistent. In *Oglesby v. RCA Corp.*, 752 F.2d 272 (7th Cir. 1985), for example, this court held that the plaintiff's claim for wrongful discharge was preempted by the collective bargaining agreement.[15] In another case involving Indiana law, *Vantine v. Elkhart Brass Mfg. Co.*, 762 F.2d 511 (7th Cir. 1985), we held that a claim for retaliatory discharge was an "allegation of a breach of the collective bargaining agreement," and consequently the claim was preempted by under § 301. *Vantine*, 762 F.2d at 517.

In another case, also decided after *Lueck*, we held that the plaintiff's "involuntary discharge" claim was preempted by § 301. *Mitchell v. Pepsi-Cola Bottlers Co.*, 772 F.2d 342 (7th Cir. 1985), *cert. denied*, 106 S.Ct. 1266 (1986). We then stated that the "federal interest in uniformity of result under section 301 has produced a multitude of cases foreclosing suits based on state common law when the disputes underlying those suits turn on the terms of an agreement between parties to a labor contract," *id.*

In *Gibson v. AT&T Technologies*, 782 F.2d 686 (7th Cir.), *cert. denied*, 106 S.Ct. 3275 (1986), the plaintiffs brought suit under a state law fraud theory. They alleged

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[15] At the time we decided *Oglesby*, the Indiana courts had not yet decided whether an employee under a collective bargaining agreement could sue for retaliatory discharge. However, our holding in *Oglesby* did not rest upon a prediction of how the Indiana courts would decide the issue.

that the defendant had improperly deprived them of a lay-off allowance that was provided for in the collective bargaining agreement. Relying on *Oglesby*, we held that the plaintiffs' action arose from the collective bargaining agreement, and therefore, was controlled by federal law. *Gibson*, 782 F.2d at 688 (*citing Lueck*).

Most recently, we reiterated our views in *Graf v. Elgin, Joliet & Eastern Railway Co.*, 790 F.2d 1341 (7th Cir. 1986). In *Graf*, we relied on *Oglesby* for the proposition that "there is overwhelming support in the case law for complete preemption in collective bargaining cases." *Graf*, 790 F.2d at 1346. Although *Graf* was decided under the Railway Labor Act, we have previously held that the NLRA, including § 301 of the LMRA, has the same preemptive effect as the RLA. *See Lancaster v. Norfolk & Western Railway Co.*, 773 F.2d 807, 816-17 (7th Cir. 1985), *cert. denied*, 107 S.Ct. 1602 (1987).[16] *Graf* is, therefore, applicable to our cases.

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[16] We have stated:

> Some cases do say that the Railway Labor Act occupies the field of labor relations in its domain even more completely than the National Labor Relations Act does in its, as shown by the fact that only the former Act requires that employment disputes be arbitrated. But when courts compare the preemptive scope of the two statutes in this way they have in mind the provisions of the NLRA that date back to the Wagner Act and create a regulatory scheme administered by the National Labor Relations Board; they are not referring to the entire NLRA, which includes amendments added by the Taft-Hartley Act in 1947 (and by later statutes), notably section 301 of the Taft-Hartley Act, 29 U.S.C. § 185. Section 301, which is just as much a part of the edifice created by the (amended) National Labor Relations Act as the parts of the Act enforced by the Labor Board, creates an exclusive federal remedy, judicially rather than administratively enforceable, for breaches of collective bargaining contracts. Where, as is true of more than 90 percent of such contracts, the contract establishes a grievance and arbitration remedy, that remedy becomes by force of section 301 exclusive, just like the arbitral remedies

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Our holding is, therefore, mandated by prior cases in this circuit. We are mindful of the Supreme Court's admonition that not "every state-law suit asserting a right that relates in some way to a provision in a collective-bargaining agreement, or more generally to the parties to such an agreement, necessarily is pre-empted by § 301." *Lueck*, 471 U.S. at 220, 105 S.Ct. at 1916. Although it is also clear that the scope of § 301 preemption must be determined on a case-by-case basis, *id.*, we conclude that, in these cases, the plaintiffs' claims of retaliatory discharge are substantially dependent upon an analysis of the terms of the collective bargaining agreements. Therefore, these claims must be treated as § 301 claims that preempt state law.

The plaintiffs argue that the definition of retaliatory discharge in Illinois does not expressly require an interpretation of a collective bargaining agreement. They argue, therefore, that the tort is not inextricably intertwined with the federal labor laws. However, this reasoning is inverted; the just cause provision in the collective bargaining agreement may well prohibit such retaliatory discharge. It is the scope of the contract that must be analyzed initially. To conclude otherwise, by analyzing the state tort first, would allow the states, through the guise of the worker's compensation laws, to circumvent the arbitration and grievance procedures envisioned by Congress

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[16] *continued*
established by the Railway Labor Act. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 105 S.Ct. 1904, 85 L.Ed.2d 206 (1985). It is therefore hard to see why that Act should have more preemptive effect than the National Labor Relations Act.

Lancaster v. Norfolk & Western Railway Co., 773 F.2d 807, 816-17 (7th Cir. 1985) (citations omitted), *cert. denied*, 107 S.Ct. 1602 (1987); *see Leu v. Norfolk & Western Railway Co.*, No. 86-1377, slip op. at 10 ("While *Allis-Chalmers* is an LMRA case, its reasoning is equally applicable to the determination of whether a claim couched in terms of a state tort actually arises under an RLA collective bargaining agreement." (footnote omitted)).

as exclusive. *See Lueck*, 471 U.S. at 210-11, 105 S.Ct. at 1911; Twitchell, 54 Geo. Wash. L. Rev. at 814 n.8.

If the tort of retaliatory discharge were not preempted by § 301, then workers covered by collective bargaining agreements would be able to bring their claims in the state courts. However, a state court would be deciding precisely the same issue as would an arbitrator: whether there was "just cause" to discharge the worker. This also would hold true in a case involving a dual motive discharge (i.e., where an employer fires an employee both because of the employee's poor attendance record, and because the employee has filed a worker's compensation claim). In such a case, the state court would have to determine if the employee would have been discharged absent the state law proscribed motive, which in turn would depend on whether the nonproscribed motive constituted "just cause" under the collective bargaining agreement. Because a claim of retaliatory discharge clearly implicates the collective bargaining agreement, these claims should be resolved, as Congress clearly intended, by the grievance procedures in the agreements. Therefore, the state tort of retaliatory discharge is inextricably intertwined with the collective bargaining agreements here, because it implicates the same analysis of the facts as would an inquiry under the just cause provisions of the agreements.[17]

[17] We recognize that § 301 does not preempt state anti-discrimination laws, even though a suit under these laws, like a suit alleging retaliatory discharge, requires a state court to determine whether just cause existed to justify the discharge. Section 301 does not preempt state anti-discrimination laws because Congress has expressly stated that state anti-discrimination remedies may exist within the framework of federal statutes that authorize multiple independent decisions. For example, Title VII and the ADEA speak with approval of the use of state remedies. *See, e.g.*, 42 U.S.C. §§ 2000(e)-5(e) & 7 (1982); 29 U.S.C. § 633(a) & (b) (1982). In contrast, the LMRA gives no hint of approval or recognition of overlapping remedies for discharges. Therefore, *Lueck* is dispositive of this case, rather than analogies to statutes such as Title VII.

The plaintiffs also argue that the state has an interest in deterring retaliatory discharge, and that permitting plaintiffs to obtain punitive damages will facilitate this goal. We do not believe that the mere availability of punitive damages in state court should prevent preemption. Federal labor law is structured to make whole a worker who was unjustly fired. After a favorable arbitration decision, a worker can be reinstated with full back pay. If the collective bargaining agreement permits, an employee may even obtain punitive damages. *Howard P. Foley Co. v. International Brotherhood of Elec. Workers, Local 639*, 789 F.2d 1421, 1423-24 (9th Cir. 1986); *see Miller Brewing Company v. Brewery Workers Local Union No. 9*, 739 F.2d 1159, 1162-63 (7th Cir. 1984), *cert. denied*, 469 U.S. 1160, 105 S.Ct. 912 (1985). Unlike a successful arbitration claim, a successful state tort claim does not ensure reinstatement. The mere possibility of punitive damages in a state court does not justify a holding that the tort involved here is not preempted. In the long run, more employers will be deterred from improperly discharging their employees by a strong arbitration system rather than by the mere possibility of punitive damages.

Finally, we note that a conclusion that state retaliatory discharge claims are not preempted would be detrimental to unions. If a state statute or common law gave all workers protection from unjustified discharges, then one of the major recruiting points of union organizers—that unionization will protect the worker against arbitrary discharge—would disappear. The effect of such a state system would be to make the worker less dependent on the arbitration remedies created by the collective bargaining contract.

We also conclude that Martin's other claims in counts V through XI, which concern either an alleged interference with the employment contract or an allegedly faulty dispute resolution system, are dependent upon the terms of the collective bargaining agreement. The claims in these last counts, like the retaliatory discharge claims, are inextricably interwined with the collective bargaining agreement.

C.

We are not the only circuit that has faced the issue of the preemptive effect of § 301 on various state claims, including the tort of retaliatory discharge. The Second, Third, and Tenth Circuits have concluded that § 301 does not preempt the state tort of retaliatory discharge; the Eighth Circuit has held that § 301 preempts such cases, while the direction of the Ninth Circuit cases is towards preemption. Although the other circuits have split over whether § 301 preempts these state law claims, we conclude that the better reasoned cases support our result.

In *Peabody Galion v. A. V. Dollar*, 666 F.2d 1309 (10th Cir. 1981), the plaintiffs, who were covered by a collective bargaining agreement, brought a retaliatory discharge suit against their employer. The court held that their claim, which was authorized under a state statute, was not preempted by the NLRA.

We decline to follow *Peabody Galion*. First, we note that it was decided prior to the Supreme Court's recent decision in *Allis-Chalmers v. Lueck*, in which the Court reaffirmed the broad preemptive effect of § 301. Second, we do not agree with the Tenth Circuit's analysis of the preemption issue. The Tenth Circuit applied preemption principles that were designed to protect the NLRB's primary jurisdiction, and not the preemption principles that govern § 301 cases. We do not believe that the scope of § 301 preemption should be determined under a balancing test that was adopted in cases that were concerned with the NLRB's primary jurisdiction. Finally, the *Peabody Galion* court did not believe that permitting workers covered by collective bargaining agreements to file retaliatory discharge claims would frustrate federal labor policy. *Id.* at 1317. In light of *Lueck*, we strongly disagree. We believe that permitting these suits will frustrate the federal policy favoring arbitration.

We also decline to follow a recent Third Circuit case, which has commented, in a footnote, on the preemptive effect of § 301 on a claim of retaliatory discharge. *See*

Herring v. Prince Macaroni of New Jersey, Inc., 799 F.2d 120, 124 n.2 (3d Cir. 1986). The *Herring* court concluded that § 301 did not preempt the retaliatory discharge claim, "[b]ecause worker's compensation rights are rooted in state law, rather than the collective bargaining agreement, and because the cause of action in question is part-and-parcel of the state's worker's compensation scheme." *Id.* at 124 n.2. We do not agree with this reasoning, in part because the court relied on *Peabody Galion*. Moreover, that a claim is a part of a state's regulatory scheme is of no import in the face of a superior federal law. Because § 301 preemption arises from Congress' plenary power under the Commerce Clause, Congress may preempt any state law that conflicts with a valid exercise of that power. The ultimate question is whether "resolution of a state-law claim is substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim . . . or dismissed as pre-empted by federal labor-contract law." *Lueck*, 471 U.S. at 220, 105 S.Ct. at 1916.

The Second Circuit has concluded that a claim of retaliatory discharge brought by an employee covered by a collective bargaining agreement is not preempted by § 301. *See Baldracchi v. Pratt & Whitney*, 814 F.2d 102 (2d Cir. 1987). In *Baldracchi*, the plaintiff alleged that she was discharged, in violation of a state statute, in retaliation for filing a worker's compensation claim. The Second Circuit concluded that because her claim was based upon a state statute, the plaintiff's claim was independent of the collective bargaining agreement. The court also concluded that the claim did not require an interpretation of the "just cause" provision. Finally, the court relied on reasoning similar to the *Herring* court's logic, which we believe to be erroneous, that even if the collective bargaining agreement permitted retaliatory discharge, the statutory rights could not be waived, so that the agreement would have no effect on the plaintiff's statutory rights.

We reject the Second Circuit's analysis of this issue.[18] The Second Circuit's analysis fails to take into account the fact that Congress can preempt a state statute. Thus, if a decision on the plaintiff's claim could be decided under the just cause provision of the collective bargaining agreement, then it is immaterial that the plaintiff's claim could also be decided with reference to the state statute. In fact, the *Baldracchi* court admitted that in determining the plaintiff's relief, reference would have to be made to the agreement. *Id.* at 106. We believe that the court in *Baldracchi* missed the real issue: that if resolution of a plaintiff's claim is substantially dependent on an interpretation of a collective bargaining agreement, then contrary state law - whether statutory or common law—must fall.

The Ninth Circuit has decided several cases concerning the preemptive effect of § 301 on various state torts. Although these cases are perhaps inconsistent, the more recent Ninth Circuit opinions support our view.

The Ninth Circuit's first major statement on the preemptive effect of § 301 was in *Garibaldi v. Lucky Food Stores, Inc.*, 726 F.2d 1367 (9th Cir. 1984), *cert. denied*, 105 S.Ct. 2319 (1985). There the court held that the plaintiff's state law cause of action for wrongful discharge, which was created to preserve the state's public policy, was not preempted by § 301.

The Ninth Circuit subsequently decided *Olguin v. Inspiration Consolidated Copper Co.*, 740 F.2d 1468 (9th Cir. 1984), which appears to have limited the holding in *Garibaldi*. In *Olguin*, the plaintiff alleged that he was fired in retaliation for filing safety complaints against his employer under OSHA regulations. *See also Scott v. Machinists Automotive Trades District Lodge No. 190*, 815 F.2d 1281, 1283 (9th Cir. 1987). The court distinguished *Garibaldi* and found that Olguin's claim was preempted by § 301 because his remedies were provided

[18] *See supra* note 8.

by his employment contract. The court seemed to undermine *Garibaldi* when it stated that the "tort of wrongful discharge has developed in some states to protect employee job security despite the historical common law rule of employment at will. *See Garibaldi*, 726 F.2d at 1374. As we have indicated, this tort is supplanted by the provisions of the collective bargaining agreement." *Olguin*, 740 F.2d at 1475.

Several recent cases from the Ninth Circuit have reinforced the *Olguin* decision. In *Williams v. Caterpillar Tractor Co.*, 786 F.2d 928 (9th Cir.), *aff'd*, 55 U.S.L.W. 4804 (June 9, 1987), the Ninth Circuit found that the plaintiffs' state law claims for breach of an employment contract were not preempted. *Williams* is not directly on point, because the plaintiff's breach of contract suit arose from contracts allegedly made during a period when the plaintiffs were not part of the bargaining unit, and thus the contracts were not within the scope of § 301. *See Caterpillar Inc.*, 55 U.S.L.W. at 4806 n.9. What is relevant, however, is that the Ninth Circuit in *Williams* seemed to read *Olguin* broadly, stating that "Olguin's wrongful discharge claim fits neatly within the scope of the 'just cause' discharge provisions of the collective bargaining agreement," *Williams*, 786 F.2d at 937. The *Williams* court also expressly questioned the rationale of *Garibaldi's* preemption discussion. *See id.* at 933-35. Another recent case with facts similar to *Garibaldi*, but reaching a different result, has questioned the conclusion in *Garibaldi*. *See Desoto v. Yellow Freight Systems*, 811 F.2d 1333 (9th Cir. 1987).

Similarly, the Ninth Circuit in *Bale v. General Telephone Co. of California*, 795 F.2d 775 (9th Cir. 1986),[19]

[19] In *Bale*, the plaintiffs, who were hired as temporary employees, became concerned that no action had been taken recognizing them as regular employees. They filed a grievance with the union, but the union would not pursue it. They then filed suit in state court,

(Footnote continued on following page)

concluded that § 301 preempted various state claims, and cited *Olguin* for the proposition that federal law preempts state tort claims when those claims are really claims alleging violations of the collective bargaining agreement. *Id.* at 779. We conclude that the Ninth Circuit cases which were decided after *Lueck—Williams*, *Bale*, and *DeSoto*—more accurately point to the direction in which that circuit is moving, and support our holding. Thus, we do not believe that our holding is in conflict with the recent decisions of the Ninth Circuit.

A recent case, directly on point, that has addressed the preemptive effect of § 301 on a retaliatory discharge claim is *Johnson v. Hussmann Corp.*, 805 F.2d 795 (8th Cir. 1986). In *Johnson*, the employee suffered an on the job injury. He was later discharged for allegedly violating posted safety rules. Johnson was covered by a collective bargaining agreement that prohibited discharge except for just cause, and which also contained arbitration and grievance procedures. Subsequently, after filing a grievance, Johnson filed suit in state court alleging, *inter alia*, retaliatory discharge for filing a worker's compensation claim. The Eighth Circuit affirmed both the district court's refusal to remand to state court and its grant of summary judgment for the defendants. The court concluded that the employee's claims were artfully pleaded and were really claims for wrongful discharge in violation of the collective bargaining agreement. Thus, the claims were substantially dependent upon an analysis of the agreement, and were, therefore, preempted by § 301. *See id.* at 797.

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[19] *continued*

alleging breach of oral contract, fraud, negligent misrepresentation, and a § 301 claim for breach of the collective bargaining agreement. The case was removed to the district court, which found that the state claims were preempted. The court of appeals affirmed, holding that the plaintiffs' state claims were preempted.

D.

In this case we decide that, although federal law does not preempt all state law claims involving a provision of a collective bargaining agreement, where a plaintiff makes a claim for wrongful discharge, this claim necessarily implicates a just cause provision. Furthermore, we conclude that when a worker, who is covered under a collective bargaining agreement, claims that a defendant has interfered with her employment contract, or has maintained a defective dispute resolution procedure, these claims also stem directly from the collective bargaining agreement, and are therefore preempted.

V.

The final step is for this court to determine the proper disposition of the plaintiffs' suit. We conclude that as a matter of federal law, the plaintiffs' failure to exhaust their remedies under the collective bargaining agreement requires us to affirm both district court orders dismissing the plaintiffs' suit.

"The federal policy favoring private arbitration of labor disputes has induced courts to establish a requirement that employees suing under section 301 first exhaust their administrative remedies." *Mitchell*, 772 F.2d at 345 (*citing Republic Steel Corp. v. Maddox*, 379 U.S. 650, 652, 85 S.Ct. 614, 616 (1965)); *D'Amato v. Wisconsin Gas Co.*, 760 F.2d 1474, 1488 (7th Cir. 1985); *Huffman v. Westinghouse Electric Corp.*, 752 F.2d 1221, 1223 (7th Cir. 1985). Therefore, an employee must attempt to use the grievance procedures set forth in the collective bargaining agreement. *Maddox*, 379 U.S. at 652, 85 S.Ct. at 616.

In *D'Amato, supra*, we stated that an employee must exhaust the grievance and arbitration provisions of the collective bargaining agreement before he or she institutes suit, if those procedures are intended to be the exclusive remedy for breach of contract claims. *D'Amato*, 760 F.2d at 1488. We then discussed several exceptions to this rule. The first exception is where "the conduct of the employer

amounts to a repudiation" of the agreement procedures so that the employer is estopped by this conduct from asserting unexhausted agreement procedures as a defense to the suit. *Id.* (*citing Vaca v. Sipes*, 386 U.S. 171, 185, 87 S.Ct. 903, 914 (1967)); *see also Bailey v. Bicknell Minerals, Inc.*, No. 86-2448, slip op. at 4 (Apr. 27, 1987). The second exception, the futility exception, provides that an employee need not resort to the grievance procedures if such action would be futile. *D'Amato*, 760 F.2d at 1488. For example, this occurs "where those who would pass on the claims are the very individuals charged with violating the complaining employee's rights." *Id.* (*citing Glover v. St. Louis-San Francisco Railway Co.*, 393 U.S. 324, 331, 89 S.Ct. 548, 552 (1969)). The last exception excuses a worker from complying with the grievance procedures when a union is relieved, for some reason, of any duty to represent the worker. *Id.*

The district court in *Martin* found that although the plaintiff never filed a formal grievance, a meeting was scheduled to discuss her discharge. Martin failed to attend that meeting. The plaintiff argued in the district court that she was not obligated to exhaust these procedures, because she fell within the second exception outlined above.[20] Plaintiff clearly did not, however, prove that, in this case, the initiation of formal grievance procedures would have been futile.

In *Lingle*, the district court dismissed the plaintiff's claim, because she failed to exhaust her administrative remedies. The court reasoned that the grievance procedures in the contract were meant to be exclusive, that the union did not breach its duty of fair representation,

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[20] The district court in *Martin* found that the plaintiff attempted to "escape the exhaustion requirement by contending that exhaustion would be futile because she knew of no successful grievance and because she was advised by a Teamsters Local Union official that the Union would not process her employment grievance with full and adequate representation." *Martin v. Carling National Breweries, Inc.*, No. 85 C 3321 (S.D. Ill. Apr. 11, 1986) (order granting defendants' motion for summary judgment).

and that the plaintiff's claim did not fall within any of the exceptions outlined in *D'Amato*.[21]

We agree with the lower court that in both cases the plaintiffs impermissibly failed to exhaust the grievance procedures under the collective bargaining agreements. Each agreement contained grievance and arbitration procedures that were intended to constitute the exclusive remedy for a breach of the contract. Federal policy favors the private arbitration of labor disputes. This policy requires that employees suing under § 301 exhaust their administrative remedies. *Mitchell*, 772 F.2d at 345. Thus, we conclude that "federal law obligated plaintiff[s] to exhaust [their] contract remedies before bringing suit under section 301." *Id.* at 347.

VI.

We hold that a district court must, prior to determining whether a state law claim is preempted, initially decide whether it has jurisdiction. We conclude that here all of the plaintiffs' claims arose under the collective bargaining agreements and, therefore, were removable under 28 U.S.C. § 1441. The next step is to determine whether federal law preempts the state claims. Although we note that § 301 does not preempt all state law claims that might involve a provision of a collective bargaining agreement, we hold that all of the plaintiffs' claims are claims for breaches of the just cause provisions of the collective bargaining agreements and thus are preempted. Finally, we note that federal labor law strongly favors the use of the grievance and arbitration mechanisms that are contained in a collective bargaining agreement. In this case, both plaintiffs failed to exhaust the grievance procedures

[21] At oral argument, counsel noted that Lingle's claim has been decided by an arbitrator. Lingle was permitted to pursue her claims under the collective bargaining agreement, because the district court concluded that her claim was really one under § 301, requiring her to exhaust the grievance procedures.

that were meant to be exclusive. Because the plaintiffs have not demonstrated that they should be exempted from this exhaustion requirement, we hold that the disposition of both cases was proper. The judgments of the district court in both *Martin* and *Lingle* are AFFIRMED.

RIPPLE, *Circuit Judge*, with whom, CUDAHY, *Circuit Judge*, joins, dissenting. In *Estin v. Estin*, 334 U.S. 541 (1948), the Supreme Court of the United States, dealing with a delicate question of federalism under the full faith and credit clause, wrote: "[T]here are few areas of the law in black and white. The greys are dominant and even among them the shades are innumerable." *Id.* at 545. This court's approach to the federalism question posed by this case evidences a decidedly different approach. Not only does the court ignore the grey areas on the legal landscape, but it even refuses to draw a "black and white" line between federal and state authority. Instead, it opts, as a practical matter, for a single-colored portrait of absolute federal authority. Because such an approach is required neither by the Constitution nor by the congressional mandate of section 301, I respectfully dissent.

A.

The court has no difficulty finding, in the dicta of its recent cases, support for its absolutist approach. *See, e.g., Graf v. Elgin, J. & E. Ry. Co.*, 790 F.2d 1341, 1346 (7th Cir. 1986).[1] However, it can find no support for such trivialization of important state interests in the controlling precedent of the Supreme Court of the United States.

[1] In *Graf*, this court stated: "Where the worker is covered by a collective bargaining contract and therefore has a potential federal remedy, judicial or arbitrable, the cases hold that that remedy is exclusive; the worker has no state remedies." *Graf v. Elgin, J. & E. Ry. Co.*, 790 F.2d 1341, 1346 (7th Cir. 1986).

And, as an intermediate appellate court in the federal system, it is that precedent and not our own predilections which must control.

As the majority acknowledges, the most recent—and most pertinent—precedent is *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202 (1985). In that case, the plaintiff worker was covered by a collective bargaining agreement that contained a provision for disability benefits for non-occupational illnesses and injuries for all employees who were represented by the union. The plaintiff, after suffering a covered injury, had a dispute with Allis-Chalmers with respect to payment of claims. Despite the availability of a grievance arbitration procedure, the plaintiff brought a *tort* action against his employer in Wisconsin state court. He alleged bad faith handling of his insurance claim. *Id.* at 206. The Wisconsin Supreme Court reasoned that the tort of bad faith, while arising out of a contractual relationship, was independent of that contract and thus not a section 301 suit.

The Supreme Court of the United States reversed. The Court began its analysis by noting that, ever since its decision in *Textile Workers v. Lincoln Mills*, 353 U.S. 448 (1957), it has been established that "§ 301 expresses a federal policy that the substantive law to apply in § 301 cases 'is federal law, which the courts must fashion from the policy of our national labor laws.' " 471 U.S. at 209 (quoting *Lincoln Mills*, 353 U.S. at 456). Therefore, "in enacting § 301 Congress intended doctrines of federal labor law uniformly to prevail over inconsistent local rules." *Teamsters v. Lucas Flour Co.*, 369 U.S. 95, 104 (1962). The Court in *Allis-Chalmers* further noted that:

> [t]he interests in interpretive uniformity and predictability that require that labor-contract disputes be resolved by reference to federal law also require that the meaning given a contract phrase or term be subject to uniform federal interpretation. Thus, questions relating to what the parties to a labor agreement agreed, and what legal consequences were intended

> to flow from breaches of that agreement, must be resolved by reference to uniform federal law, whether such questions arise in the context of a suit for breach of contract or a suit alleging liability in tort.

471 U.S. at 211. Any other course, suggested the Justices, would create uncertainty as to the contractual rights of the parties and "disputes as to the nature of the agreement would proliferate." *Id.* As noted by the Court:

> Since nearly any alleged willful breach of contract can be restated as a tort claim for breach of a good-faith obligation under a contract, the arbitrator's role in every case could be bypassed easily if § 301 is not understood to pre-empt such claims. Claims involving vacation or overtime pay, work assignment, unfair discharge—in short, the whole range of disputes traditionally resolved through arbitration—could be brought in the first instance in state court by a complaint in tort rather than in contract. A rule that permitted an individual to sidestep available grievance procedures would cause arbitration to lose most of its effectiveness . . . .

Id. at 219-20.

At the same time, however, the Court in *Allis-Chalmers* quite pointedly noted that "not every dispute concerning employment, or tangentially involving a provision of a collective-bargaining agreement, is pre-empted by § 301 or other provisions of the federal labor law." *Id.* at 211. Indeed, noted the Court:

> [c]learly, § 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law. In extending the pre-emptive effect of § 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract.

Id. at 212. The analysis must focus, said the court, on "whether evaluation of the tort claim is *inextricably intertwined with consideration of the terms of the labor contract.* If state tort law purports to define the meaning of the contract relationship, that law is pre-empted." *Id.* at 213 (emphasis supplied).

In *Allis-Chalmers*, the Supreme Court concluded that the Wisconsin court's determination that the tort claim was independent of the contract claim meant only that the implied duty to act in good faith was different from the contractual duty to pay. However, noted the Supreme Court, both duties ultimately depend upon the terms of the contract. Both claims "are tightly bound with questions of contract interpretation that must be left to federal law." *Id.* at 216. Since resolution of the state-law claim is "substantially dependent upon analysis of the terms of an agreement made between the parties in a labor contract, that claim must either be treated as a § 301 claim, or dismissed as pre-empted by federal labor-contract law." *Id.* at 220 (citation omitted).

The Supreme Court has recently reaffirmed that the holding of *Allis-Chalmers* has "precise limits." In *International Bhd. of Elec. Workers v. Hechler*, 55 U.S.L.W. 4694 (U.S. May 26, 1987), Justice Blackmun, writing for the Court, noted:

> The Court took care in *Allis-Chalmers* to define the precise limits of its holding. The rule there set forth is that, when a state-law claim is substantially dependent on analysis of a collective-bargaining agreement, a plaintiff may not evade the pre-emptive force of section 301 of the LMRA by casting the suit as a state-law claim. 471 U.S., at 220. The Court emphasized, however: "In extending the pre-emptive effect of section 301 beyond suits for breach of contract, it would be inconsistent with congressional intent under that section to pre-empt state rules that proscribe conduct, or establish rights and obligations, independent of a labor contract." *Id.*, at 212.

Id. at 4696 n.3; *see also Caterpillar Inc. v. Williams*, 55 U.S.L.W. 4804 (U.S. June 9, 1987).

B.

As noted above, this court—as an intermediate appellate tribunal in the federal system—has a limited role. It must apply the analysis of *Allis-Chalmers* to the cases before it. It must determine "whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract. If the state tort law purports to define the meaning of the contract relationship, that law is pre-empted." 471 U.S. at 213.

When measured against this standard, cases involving retaliatory discharge for filing workers' compensation claims are very different from the situation in *Allis-Chalmers*. The plaintiffs assert no right under the collective bargaining agreement. Rather, they assert that the employer cannot, in violation of state law, retaliate against them for applying for a workers' compensation benefit provided by state law. This right is hardly "inextricably intertwined with consideration of the terms of the labor contract." *Id.* Indeed, it is quite distinct from the rights established by the contract. It is grounded in state law; it does not depend on the rights established by contract; it does not require that reference even be made to the contract. By bringing these actions, the plaintiffs do not circumvent the congressional directive that "federal law govern the meaning given contract terms." *Id.* at 218-19.

Today, the majority simply fails to realize that *Allis-Chalmers* requires a far more focused analysis than the one undertaken by the court. We are not asked in this case to determine whether all state law claims for wrongful discharge are within the preemptive ambit of § 301. In analyzing the preemptive effect of § 301, the general tort of wrongful discharge must be distinguished from the tort of retaliatory discharge for having sought the protection of a state's workers' compensation scheme. In the general wrongful discharge claim, the cause of action may well be premised on activity directly covered by the collective bargaining agreement. *See, e.g., Bale v. General Tel. Co. of Cal.*, 795 F.2d 775, 780 (9th Cir. 1986).

However, in the present retaliatory discharge claim, the cause of action arises from the state's important public policy interest—independent of the collective bargaining agreement—in preserving its workers' compensation system.[2] A state has a strong interest in protecting its employees through its workers' compensation scheme and can, if it chooses, protect those workers from retaliation for seeking assistance from this program. Indeed, it would be "inconsistent with congressional intent," *Allis-Chalmers*, 471 U.S. at 212, to preempt state regulation of this sort which, while furthering an important state interest, is neither "inextricably intertwined with consideration of the terms of the labor contract," *id.* at 213, nor "purports to define the meaning of the contract relationship." *Id.* Indeed, "§ 301 does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law." *Id.* at 212. Nor can the possibility that, on a certain number of instances, the state court may have to determine whether the discharge was based on the filing of a workers' compensation claim or upon other grounds justify wholesale preemption of state law. As Chief Judge Feinberg pointed out in *Baldracchi v. Pratt & Whitney Aircraft Div., United Technologies Corp.*, 814 F.2d 102 (2d Cir. 1987):

> [The defendant employer] would have to satisfy the trier of fact in the state court only that it fired [the employee] for a reason unrelated to her filing a workers' compensation claim. Though it would have to show that the reason was more than a pretext, it would not have to establish that the grounds for [the

[2] Indeed, a claim for retaliatory discharge for having sought the protection of a state's workers' compensation scheme is a prime example of the situation alluded to by the Supreme Court in *Allis-Chalmers* that not "every state-law suit asserting a right that relates in some way to a provision in a collective-bargaining agreement, or more generally to the parties to such an agreement, necessarily is pre-empted by § 301." *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985).

No. 87-851

Supreme Court, U.S.
FILED
JAN 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1987

ROGER CLARK, CARL BUSHEY, JOHNNY RUSSELL, TERRY FISCHER, AND BART VIGLIEMO,

Petitioners,

v.

MOMENCE PACKING COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM OF THE RESPONDENT

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January 11, 1988

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QUESTIONS PRESENTED

The petitioners present three questions for review. The first is whether an employer may remove an action for retaliatory discharge to federal court where the employee is covered by a collective bargaining agreement subject to Section 301 of the Labor Management Relations Act.

The second question presented is whether 28 U.S.C. Section 1445 (c) which bars the removal of actions arising under a state's workman's compensation law is applicable to the petitioner's claim for wrongful discharge where the petitioner is covered by a collective bargaining agreement which has a "just cause" provision.

The third question presented by the petitioners is whether Section 301 of the Labor Management Relations Act provides the exclusive remedy for a unionized employee and therefore preempts any action in a state court for retaliatory discharge.

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM OF THE RESPONDENT[1]

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[1] Pursuant to Rule 28.1, respondent states Momence Packing Company is an Illinois Corporation that has no subsidiaries or affiliates and is not itself a subsidiary or affiliate and has no parent corporation.

ARGUMENT

1. The issues raised by the Petitioners have been categorically decided by this Court; and therefore, the petition for Certiorari should be denied. This Court has previously held, as a matter of law, that suits for breaches of collective bargaining agreements are properly removed to Federal Court and are preempted by Section 301 of the National Labor Relations Act where the state court tort claims are inexorably intertwined with the issues arising within the collective bargaining agreement. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 88 L.Ed. 2d 206, 105 S.Ct. 1904 (1985).

In *Allis-Chalmers*, the employee was covered by a collective bargaining agreement which empowered the arbitrator to provide the final dispute resolution. *Allis-Chalmers*, 88 L.Ed. 2d 206. The employee in *Allis-Chalmers* filed a state court action based on a tort theory involving a disability claim and the Wisconsin Supreme Court held that this action could stand as an independent tort action for violation of the disability plan. This Court however, reversed the Wisconsin Supreme Court and held that the tort claim was so "rooted" within the terms of the collective bargaining agreement that the state tort claim "could have been pleaded as a contract claim under Section 301". *Allis-Chalmers Corp.*, 85 L.Ed. 2d at 221. This Court held that Federal Labor Law preempted the state tort action and that the failure of the plaintiff to exhaust the internal contract remedy provided in the collective bargaining agreement mandated that the entire matter be dismissed. *Allis-Chalmers Corp.*, 85 L.Ed. 2d at 221.

The present case is factually similar to *Allis-Chalmers* because it is undisputed that the petitioners here were employees bound by a collective bargaining agreement with a concurrent grievance procedure and language that gave the arbitrator the exclusive power to determine the parties' rights in a dispute. Also as in *Allis-Chalmers*, the petitioners filed a state court tort action. The petitioners here filed a retaliatory discharge claim in state court

alleging that they had been terminated for filing a workman's compensation case. As in *Allis-Chalmers*, the petitioners' tort claim involved questions of whether their termination was "for cause" within the provisions of the collective bargaining agreement, and required an interpretation of the collective bargaining agreement and resolution through the grievance procedure. In this case, as in *Allis-Chalmers*, the question of the contractual provisions were so intertwined with the state court tort claim so that they "could have been pleaded as a contract claim under Section 301"; and therefore, the claim must either be treated as a Section 301 claim, or dismissed as pre-empted by federal labor contract law.

In the present case, the District Court and the Seventh Circuit correctly applied the holding in *Allis-Chalmers* and treated petitioners' state court claim as really one arising under Section 301. The District Court correctly held, and the Seventh Circuit affirmed, that the entire case should be dismissed because the state court action was preempted by Section 301 and the petitioners failed to exhaust the internal union grievance procedure. Therefore, the petition for a writ of certiorari should be denied.

2. While this Court has recently accepted certiorari on the case of *Lingle v. Norge Division of Magic Chef, Inc.*, 823 F.2d 1031 (7th Cir., 1987) *cert. granted*, No. 87-259, the respondent here believes that the petition in the present case should be denied because all issues raised have been definitively resolved by the case of *Allis-Chalmers, Supra*.

3. Petitioners erroneously attempt to distinguish this case from *Lingle, Supra*, on the basis that the federal district court obtained jurisdiction based on the removal statute. 28 U.S.C. Secton 1441. However, this Court has previously and definitively decided this issue and has held that "when 'the heart of the [state law] complaint [is] a . . . clause in the collective bargaining agreement,' . . . that complaint arises under federal law," and is therefore,

properly removed to federal court within the meaning of 28 U.S.C. 1441. *Caterpillar Inc. v. Williams*, ___ U.S. ___, 125 LRRM 2521 (U.S., 1987), citing *Avco v. Machinists*, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed. 2d 126 (1968). This court held that where a federal statute has completely preempted the field, then any state cause of action "that comes within the federal cause of action necessarily arises under" federal law and is properly removed. *Caterpillar Inc. v. Williams*, 125 LRRM 2521 (U.S., 1987); citing *Franchise Tax Board of Cal. v. Construction Laborers Vacation Trust for Southern Cal.*, 463 U.S. 1, 103 S.Ct. 2841, 77 L.Ed. 420 (1983).

In the present case, as stated above, this is an action for retaliatory discharge filed by employees covered by a collective bargaining agreement and is so intertwined with the "just cause" provisions of the collective bargaining agreement so as to make it an action "arising under" the federal law; and therefore, properly removed to federal court under the removal statute. Since this court has previously determined that the federal law completely preempts any actions involving the interpretation of a collective bargaining agreement, and since those cases arise under federal law and are properly removable, the petitioners' application for a writ of certiorari should be denied. See *Caterpillar Inc. v. Williams*, 125 LRRM 2521 (U.S., 1987) and *Avco v. Machinists*, 390 U.S. 557, 88 S.Ct. 1235, 20 L.Ed. 2d 126 (1968).

4. Further, petitioners' argument that this court should accept certiorari in the present case even if it does not accept certiorari in the cases of *Baldracchi v. Pratt & Whitney*, 814 F.2d 102 (2d Cir. 1987) *cert. pending*, No. 87-318 and *Willoughby v. Central Ill. Light Co., cert. pending*, No. 87-417 is also without merit. Again, all of the issues raised in *Baldracchi*, *Willoughby*, as well as those raised in the present case, have been clearly decided by the case of *Allis-Chalmers, Supra;* and therefore, the petition should be denied.

5. Petitioners continued reliance on 28 U.S.C. 1445 (c), which prohibits the removal of actions arising under a state's workman's compensation law, is equally non-meritorious and clearly not subject to a petition for certiorari. As stated above, this court has already held that an action by an employee covered by a collective bargaining agreement is really an action seeking to enforce the terms of the agreement and is governed by Section 301 of the Labor Management Relations Act. *Avco v. Machinists, Supra.* According to *Avco*, this action is not, as a matter of law, an action arising under the state's workman's compenstion law; therefore, Section 1445 (c) is inapplicable to the present cause of action. Petitioner's request for a writ of certiorari should be denied.

6. Petitioners' assertion that this Court should grant their petition in order to distinguish this case from the case of *Caterpillar Inc. v. Williams*, ___ U.S. ___, 125 LRRM 2521 (U.S., 1987), is entirely without merit. In *Williams*, the plaintiff's claim was based on an individual employment contract and not on a collective bargaining agreement as in this case. This Court was careful to distinguish claims founded directly on Section 301 of the National Labor Relations Act from those founded on individual employment contracts and held that "individual employment contracts" are separate and apart from rights created by a collective bargaining agreement. *Williams* at 2524. This Court held that any claim made pursuant to an individual employment contract does not fall within the Section 301 preemption because it does not depend on an interpretation of the collective bargaining agreement and is therefore, purely a state court action. *Williams* at 2524.

In the present case, petitioners have never maintained that they had an employment contract separate and apart from the collective bargaining agreement as in the *Williams* case. The *Williams* case is not applicable to the present case and the determination of whether the

petitioners' termination was proper is necessarily dependent upon the terms of the collective bargaining agreement. Therefore, the holding in *Allis-Chalmers, Supra*; rather then *Williams, Supra*, is applicable to the present case. As previously stated, the District Court and Court of Appeals correctly applied *Allis-Chalmers* to the present case and the petition for a writ of certiorari should be denied.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied and the judgment of the Court of Appeals summarily affirmed.

Respectfully submitted,

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January 11, 1988

APPENDIX

STATUTES INVOLVED

28 U.S.C. Section 1441(a)(b)(c):

(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.

(b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State in which such action is brought.

(c) Whenever a separate and independent claim or cause of action, which would be removable if sued upon alone, is joined with one or more otherwise nonremovable claims or causes of action, the entire case may be removed and the district court may determine all issues therein, or, in its discretion, may remand all matters not otherwise within its original jurisdiction.

SECTION 301 OF THE LABOR MANAGEMENT RELATIONS ACT, 29 U.S.C. Section 185(a):

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

28 U.S.C. SECTION 1445(c) provides:

> A civil action in any State Court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States.